

IN THE UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF TENNESSEE
 AT KNOXVILLE

UNITED STATES OF AMERICA

Plaintiff,

v.

MARK HAZELWOOD,
 SCOTT WOMBOLD,
 HEATHER JONES, and
 KAREN MANN,

Defendants.

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3:16-CR-20

Chattanooga, Tennessee
 January 11, 2018

BEFORE: THE HONORABLE CURTIS L. COLLIER
 UNITED STATES DISTRICT JUDGE

APPEARANCES:

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JURY TRIAL
FIFTEENTH DAY OF TRIAL

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INDEX OF PROCEEDINGS

BOB MASSENGILL

Cross-Examination by Mr. Cooper. 7

CLAUDEANE WHALEY

Direct Examination by Mr. Hamilton 15

Cross-Examination by Mr. Hardin. 49

Cross-Examination by Mr. Rivera. 72

Cross-Examination by Mr. Murray. 134

Cross-Examination by Mr. Cooper. 143

Redirect Examination by Mr. Hamilton 164

JENNIFER DALMIDA

Direct Examination by Mr. Hamilton 172

Cross-Examination by Ms. Brevorka. 180

Cross-Examination by Mr. Platt 181

DARREN MATTHEW SEAY

Direct Examination by Mr. Hamilton 182

GOVERNMENT'S EXHIBITS

<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>RECEIVED</u>
401	Mark Hazelwood Deferred Compensation Agreement	16
402A	Mark Hazelwood Compensation Summary Backup	17
403A	Scott Wombold Compensation Summary Backup	23
403	J. Scott Wombold Compensation (2008-2012)	23
404A	Heather Jones Compensation Summary Backup	25
404	Heather L. Jones Compensation (2008-2012) (ID only)	25
405A	Karen Mann Compensation Summary Backup	28
405	Karen R. Mann Compensation (2008-2012)	28
409	Scott Wombold Commission Breakdown Reports	30
410	Heather Jones Commission Breakdown Reports	43
411	Karen Mann Commission Breakdown Reports	46

1	<u>GOVERNMENT'S EXHIBITS</u> (Continuing)		
2	1901	Sherry Blake June 2014 Verizon (865) 805-7148	172
3	1901A	Highlighted Calls	173
4	1902	Scott Wombold April 2013 Cellco (865) 207-3211	179
5	1902A	Highlighted Calls	179
6	727A	Queen Transportation Off Invoice on Comparison Summary	230
7	810A	BP Express Rebate Payment Comparison Summary (ID Only)	230
8	1522A	JTL Rebate Payment Comparison Summary (ID Only)	230
9	1613A	Amerifreight Rebate Payment Comparison Summary (ID Only)	230
10	1712A	Halvor Rebate Payment Comparison Summary (ID Only)	230
11	1826A	Ryder Rebate Payment Comparison Summary (ID Only)	230
12			
13	<u>JOINT DEFENSE EXHIBITS</u>		
14	<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>RECEIVED</u>
15	13035	Signed Commission Breakdown Report from Various Months from June 2010	85
16	13004	Signed Commission Breakdown Report from Various Months from March 2010	86
17	13002	Signed Commission Breakdown Report from Various Months from July 2010	87
18	13003	Signed Commission Breakdown Report from Various Months from Various Months in 2011	91
19			
20			
21			
22			
23			
24			
25			

<u>JOINT DEFENSE EXHIBITS</u> (Continuing)			
	<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>RECEIVED</u>
1	342	8-24-17 Declaration of Claudeane Whaley Re: Commission Breakdowns	92
2	322	5-24-2011 E-mail from Borden to Freeman Re: Book2.xls	114
3	324	3-29-2010 E-mail from Jones to Borden Re: Question about Rest. P&L	120
4	338	E-mail from Vicki Borden to Heather Jones and others	120
5	326	4-8-2013 E-mail between Borden and Spiewak Re: Help	120
6	327	10-15-2010 E-mail from Jones to Borden Re: Rebates	120
7	329	6-2-2009 E-mail fro Ryding to Borden Re: US Food	120
8	330	1-18-2013 E-mail from Welch to Borden Re: Just Make up His Commission	120
9	331	8-18-2010 E-mail from Borden to Direct Sales Re: Commission	120
10	332	2-8-2010 E-mail from between Borden and Jones Re: Commission Percent	120
11	333	3-23-2010 E-mail from Borden to Mosher Re: They Have Gotten So Complicated	120
12	335	2-21-2011 E-mail from Carter to Borden and Carter	120
13	336	5-19-2009 E-mail from Fenwick to Borden Re: Commission Question	120
14	337	11-9-2009 E-mail from Careter to Borden Re: Mistakes Can Happen	120
15	339	7-22-2008 E-mail from Stooksbury to Borden Re: Commissions	120

1 JOINT DEFENSE EXHIBITS (Continuing)

2 <u>NUMBER</u>	<u>DESCRIPTION</u>	<u>RECEIVED</u>
3 340	8-20-2009 E-mail from Welch to Borden Re: Interactive Logistics	120
4 341	6-5-2012 E-mail from Greco to Borden and Crutchman, Re: APEX and Westar	120
5 325	10-13-2008 E-mail from Hamilton to Borden Re: Holly's New House	120
6 1473	Mann Salary History 2004-September 2014	160

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10 THE COURT: You may proceed.

11 MR. COOPER: Thank you, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. COOPER:

14 Q Good morning, Mr. Massengill.

15 A Good morning.

16 Q My name is Jonathan Cooper. I represent Karen Mann.
17 Do you know Karen?

18 A Not really, no.

19 Q Okay. Well, yesterday the government was asking you
20 questions about a particular exhibit, and I'd like to call
21 that up, please. It's Government Exhibit 2249, and if we
22 could go to the very bottom of the second page on that. Do
23 you recall being asked questions about that -- about this?

24 A I do.

25 Q I think --

1 MR. COOPER: At the bottom of the second page,
2 please, Stacey. To the first part, the body of that first
3 e-mail. Thank you.

4 BY MR. COOPER:

5 Q So government attorneys showed you this exhibit and
6 had you read it to the jury. Do you recall that?

7 A I do.

8 Q And this is an e-mail between Ron Carter and Karen
9 Mann. Is that right?

10 A Correct.

11 Q And you were not a party to this e-mail
12 conversation?

13 A Correct.

14 Q And you did not bring this e-mail to the attention
15 of the government. Is that right?

16 A Correct.

17 Q They brought it to you --

18 A Correct.

19 Q -- to review? And they asked you, sir, to testify
20 that this was in fact an e-mail exchange between two Pilot
21 employees. Is that right?

22 A Yes.

23 Q And they just wanted you to be able to say that this
24 was a thread of e-mail messages between Ron Carter and Karen
25 Mann, correct?

1 A That went through the Pilot e-mail system.

2 Q Yes, that went through the Pilot e-mail system.

3 A Correct.

4 Q And were you aware that Karen Mann was the inside
5 sales representative for Ron Carter?

6 A Yes.

7 Q And do you know what territory they were covering?

8 A No.

9 Q Okay. Now, what is -- what is the subject of this
10 e-mail thread?

11 A Fleet E-X.

12 Q Or --

13 A Fleetex.

14 Q So you don't know if it's Fleet E-X or Fleetex?

15 A I don't.

16 Q All right. So you're not familiar with this company
17 then?

18 A I am not.

19 Q You don't know if they were direct bill or
20 restricted?

21 A I do not.

22 Q You don't know what their credit history was at the
23 time?

24 A I do not.

25 Q You don't know what their purchasing history was at

1 the time?

2 A Correct. I do not.

3 Q You don't know how many trucks that they ran?

4 A I do not.

5 Q And you don't know if they had a seasonal business?

6 A I do not.

7 Q Let's look at the body of this e-mail. And this is
8 from Karen Mann. Is that right?

9 A Yes.

10 Q And she says, "Their manual rebate is CP .04. Can I
11 change it to CP .05 across the board?" Is that what it says?

12 A Yes.

13 Q What's the date of this e-mail?

14 A September 12th, 2011.

15 Q Okay. Does that date have any significance to you,
16 sir?

17 A No, sir.

18 Q Okay. And do you know what Karen Mann means when
19 she tells her supervisor that the customer's manual rebate is
20 CP .04?

21 A Cost plus.

22 Q Okay. All right. And when she asked to change it
23 to cost plus .05, quote, "across the board," do you know what
24 that means?

25 A No, sir.

1 Q Okay. Now, you do not know the history of this
2 customer?

3 A I do not.

4 Q Don't know what the customer's discount was?

5 A I do not.

6 Q Do not know what Ron Carter negotiated with the
7 representative of Fleetex?

8 A I do not.

9 Q Do not know what Ron Carter offered the customer?

10 A I do not.

11 Q You don't know if this customer signed a contract
12 with Pilot?

13 A I do not.

14 Q Do not know if Ron Carter put this deal in writing?

15 A I do not.

16 Q And are you aware that there can be many different
17 arrangements for a cost-plus discount?

18 A Yes.

19 Q All right. For example, Ron Carter may have
20 promised this company an average dollar amount for a rebate or
21 discount each month. Is that right?

22 A I would have no way to know that.

23 Q And that's my point. But it's possible, then, that
24 he could --

25 MR. HAMILTON: Objection. Objection, Your Honor.

1 MR. COOPER: I'll rephrase.

2 BY MR. COOPER:

3 Q It was the practice within Pilot, are you aware,
4 sir, that a company could be offered not a cost plus .02 or
5 cost plus .03 or cost plus .04 specifically tied to a cents,
6 but simply a general cost-plus discount?

7 A Yes.

8 MR. HAMILTON: Objection. Beyond the scope.

9 THE COURT: It's already been answered.

10 Go on, Counsel.

11 BY MR. COOPER:

12 Q And they could have been promised simply an average
13 rebate amount each month without being promised a particular
14 cost -- being told a particular cost-plus number?

15 MR. HAMILTON: Objection. Beyond the scope.

16 THE COURT: Sustained.

17 MR. COOPER: Your Honor, please, if I may be allowed
18 to reply to that?

19 THE COURT: I think this person's testimony is, he's
20 a computer infrastructure or technology infrastructure person.
21 And his testimony was that based upon his knowledge of the
22 infrastructure of Pilot, he could testify that these e-mails
23 and text messages and iPad messages either were generated from
24 the Pilot system or came into the Pilot system. I think there
25 has been testimony there were about, what, 2000 Pilot

1 employees. So to assume that this person would have any
2 knowledge at all of the substance of all those communications
3 and what would be involved, I think, would be asking the
4 extraordinary. He's a technology person.

5 THE WITNESS: (Moving head up and down.)

6 THE COURT: If you'd like to ask him about coding and
7 technology, I think that would be fair game. But asking him
8 about the substance of a particular message and what that --
9 might flow from it, I think his answer is going to be, he has
10 no idea, he has no way of knowing. It would be like asking him
11 who built the Empire State Building.

12 MR. COOPER: Well, I hope --

13 THE COURT: He would be more knowledgeable about who
14 built the Empire State Building than he would be about the
15 subject of any of these e-mails.

16 MR. COOPER: Well --

17 THE WITNESS: (Moving head up and down.)

18 THE COURT: You see he's nodding his head. He's in
19 agreement with that. He has absolutely no idea of any of this
20 stuff that you're asking him about.

21 MR. COOPER: And the Court is picking up on the point
22 of these questions, and I hope everyone else in the courtroom
23 has picked up on it. Let me see if I understand the Court's
24 ruling from yesterday about the admissibility of this exhibit.
25 Is this Court saying that this --

1 THE COURT: The Court is not saying anything. What
2 the Court is doing is ruling on an objection based on the rules
3 of evidence.

4 MR. COOPER: Okay.

5 THE COURT: There is an objection this exceeds the
6 scope of direct examination.

7 MR. COOPER: And that's --

8 THE COURT: And the Court has ruled upon that and
9 also commented that this witness was called to the stand to
10 testify in his area of knowledge. His area of knowledge is
11 computers and infrastructure and these things that go through
12 space, these electromagnetic waves that go through space that
13 allows us to understand things. And what you're asking him
14 about is the substance of something he has no knowledge -- no
15 knowledge of that.

16 MR. COOPER: I will -- I will skip over the next set
17 of questions.

18 THE COURT: I think your point is clear that he has
19 absolutely no idea about any of these things in the messages at
20 all.

21 BY MR. COOPER:

22 Q With that in mind, Mr. Massengill, I will jump to
23 what I hope to be my last question. You have no reason to
24 believe this customer was paid less than owed for their
25 discount?

1 MR. HAMILTON: Objection. Beyond the scope.

2 THE COURT: Sustained.

3 MR. COOPER: Very well. Thank you, Your Honor.

4 Thank you, Mr. Massengill.

5 THE WITNESS: You're welcome.

6 (Brief pause.)

7 MR. HAMILTON: Your Honor, the United States has no
8 redirect for this witness. May he be excused?

9 THE COURT: Thank you, sir. You may step down.

10 (Witness excused.)

11 THE COURT: Call your next witness.

12 MR. HAMILTON: The United States calls Claudine
13 Whaley.

14 (Brief pause.)

15 CLAUDEANE WHALEY,

16 called as a witness at the instance of the government, having
17 been first duly sworn, was examined, and testified as follows:

18 DIRECT EXAMINATION

19 BY MR. HAMILTON:

20 Q Will you introduce yourself for the jury, please.

21 A Hi. I'm Claudeane Whaley. I am the senior manager
22 of payroll for Pilot Flying J.

23 Q How long have you worked at Pilot?

24 A It will be 16 years in March.

25 Q And in your 16 years, what jobs have you held at

1 Pilot?

2 A I came there as a payroll supervisor, then was
3 promoted to payroll manager, then to senior manager, payroll.

4 Q And what are your responsibilities as the senior
5 manager of payroll at Pilot?

6 A I supervise a staff of 13 people responsible for
7 producing and processing a weekly payroll in U. S. and Canada
8 for 28,000 people, and any off-cycle -- any other activities
9 associated with payroll.

10 Q When you say 28,000 people, who are those people?

11 A They're all across both countries, Pilot employees
12 at our field locations, our stores, our shops, our truck
13 drivers, and our support center.

14 Q So does Pilot have approximately 28,000 employees?

15 A Total, yes.

16 Q Let me direct your attention, please, to Government
17 Exhibit 401. Are you familiar with this document?

18 A I am.

19 Q And what is this document?

20 A This is a deferred compensation agreement between
21 Mark Hazelwood and Pilot Corporation.

22 Q Does your department maintain a copy of this
23 document?

24 A Yes, we do.

25 Q Does your -- was your department responsible for

1 Mr. Hazelwood's salary payments while he was employed there?

2 A Yes, we were.

3 Q Was Mr. Hazelwood's compensation based on this
4 agreement while he worked there?

5 A Yes, it was.

6 Q Looking at the paragraph that's highlighted on the
7 screen here, what compensation was Mr. Hazelwood entitled to
8 during the years 2008 through 2018?

9 A Three and a half percent of the after-tax net
10 earnings of Pilot Travel Centers, LLC.

11 Q Looking at the first line, where it says, "Hazelwood
12 shall be entitled to deferred compensation each year," even
13 though that line says "deferred compensation," based on your
14 work in the payroll department, what amounts of this three and
15 a half percent of Pilot's net after-tax earnings could
16 Mr. Hazelwood elect to receive each year?

17 A He could elect to receive all of it.

18 Q And, typically, during the course of Mr. Hazelwood's
19 employment, approximately what did he elect to receive during
20 each calendar year?

21 A 100 percent.

22 Q Is Mr. Hazelwood still employed at Pilot?

23 A He is not.

24 Q Let me direct your attention first to-- We're now
25 going to turn to what's been marked as 402A. Could you open

1 up your binder there, please, and turn to a copy of 402A. The
2 first page of it is on the screen. And is Government's
3 Exhibit 402A a multi-page document?

4 A It is.

5 Q Would you please tell the jury what the documents
6 are that are -- that make up 402A?

7 A Yes. There is a wage analysis, basically just like
8 a payroll register, for an individual, and it's a canned
9 report in the payroll system, and we put parameters in for the
10 dates and the employees that we want, and it pulls -- this
11 one, for instance, is for 1/1/'8 to 12/31/'8.

12 Q Ms. Whaley, when you say "it pulls," what is "it"?

13 A "It" is the system.

14 Q And what is the system?

15 A It was Lawson payroll system.

16 Q And then you used the term, I think, "canned
17 report"?

18 A Yes. That's a report that's delivered by Lawson.
19 We don't have to create it. We only have to put in
20 parameters, and it determines the data. The PR260, to us,
21 means a wage analysis.

22 Q A PR260 is what?

23 A That's the name of the report.

24 Q And what years are reflected in Documents 4- -- in
25 Document 402A? Government Exhibit 402A. Excuse me.

1 A It is 1/1 of 2008 through 12/31 of 2012.

2 Q Is there a report run for each year?

3 A Yes, there is.

4 Q And approximately how many pages are in Government
5 Exhibit 402A?

6 A There would be two pages for each year.

7 Q And do all of the pages look like this, that we see
8 on the screen?

9 A That's the first page, which is the parameter page.
10 And the second page is a summary of the earnings and
11 deductions.

12 Q Let's go to that page, please, on the screen, the
13 second page of this exhibit. And so do -- we're looking at
14 the second page of Government Exhibit 402A. And is this the
15 way in which the data is reported and presented after the
16 canned report is run through the Lawson payroll system?

17 A Yes. This is the summary page.

18 Q Let me direct your attention now to Government
19 Exhibit 402. And does Government Exhibit 402 relate to what
20 we just looked at, part of 402A?

21 A Yes. This is an annual summary, by year, of the
22 total compensation.

23 Q All right. And does 402, what's on the screen right
24 now, summarize the canned reports that make up 402A?

25 A Yes, it does.

1 Q Did you supervise the creation of this summary?

2 A Yes, I did.

3 Q And does it summarize accurately all of the
4 information contained in 402A?

5 A Yes, it does.

6 Q And will the use of this summary assist you in
7 explaining Mr. Hazelwood's compensation from 2008 to 2012?

8 A Yes.

9 Q All right.

10 MR. HAMILTON: The United States -- again, I know
11 this exhibit has been numbered, but just for the record, the
12 United States is offering this as a secondary evidence summary
13 pursuant to *United States vs. Kerley*.

14 BY MR. HAMILTON:

15 Q Ms. Whaley, looking at the year -- year ending 2008,
16 would you please tell the jury how much the summary shows that
17 Mr. Hazelwood made in total compensation that year?

18 A 13,992,392.81.

19 Q And does part of that figure include a category
20 called Growth Partner bonus?

21 A Yes, it does.

22 Q And how, if in any way, does the Growth Partner
23 bonus relate to the deferred expense agreement, Exhibit 401?

24 A It's included in that pay code.

25 Q Let's look at the next year, please. So for the

1 year ending 2009 -- and I'm saying "year ending," and let me
2 just make a record of this. Do you see the letters Y-E?

3 A Yes.

4 Q Does that stand for "year ending"?

5 A It does.

6 Q So looking at year ending 2009, what is the amount
7 of Growth Partner bonus compensation that Mr. Hazelwood
8 received?

9 A 11,453,881.80.

10 Q What was his total compensation for 2009?

11 A 15,076,119.33.

12 Q Let's move to 2010. And for the year ending 2010,
13 what was his Growth Partner bonus amount?

14 A Seven million two -- seven two four four seven
15 ninety.

16 Q Is it \$7,002,447.90?

17 A Yes.

18 Q And what is the total compensation for the year
19 2010?

20 A 12,246,315.03.

21 Q And turning to year ending 2011, what is his
22 Growth -- what was his Growth Partner bonus for 2011?

23 A 9,163,438.95.

24 Q And the grand total?

25 A 11,275,375.53.

1 Q And, last, looking at 2012, what was the Growth
2 Partner bonus for 2012?

3 A 14,049,757.54.

4 Q And his total compensation for 2012?

5 A Was 26,938,529.33.

6 THE COURT: Mr. Hamilton, let me make a comment to
7 the jury.

8 Ladies and gentlemen, you heard Mr. Hamilton, in
9 reference to this particular exhibit, indicate that it was a
10 summary exhibit. The rules of evidence allow the parties to
11 use summaries. So what you're seeing here is not something
12 that would have been created at the time. What this witness
13 did was to take a lot of other documents and take information
14 from those documents and put them on this document for ease of
15 understanding and ease of use.

16 Because it is a summary document and it's not the
17 source document, the summary document will not go back to you
18 when you start deliberating, unlike the other exhibits. This
19 is an exhibit to help you understand things and help you see
20 things. If, when you start deliberating, you'd like to see it
21 again, just let the Court know, we'll bring you back in court,
22 and you can see it. But it is different from the other
23 exhibits. So if you start deliberating and you start looking
24 for this and you don't see it, that's the reason why.
25 Exhibits that are introduced merely for explanation or summary

1 purposes are different from other exhibits that you will
2 always see.

3 BY MR. HAMILTON:

4 Q Let me direct your attention now to Exhibit 403A.
5 And can you tell us what Exhibit 403A is?

6 A It is the same canned report, PR260, for Scott
7 Wombold.

8 Q And when you say "same canned report," what do you
9 mean?

10 A The PR260 summary report of the wages for -- this
11 one is for 2008.

12 Q And which years are included in Government
13 Exhibit 403A?

14 A 1/1/2008 through 12/31/2012.

15 Q And like Exhibit 402A before it, is 403A a
16 multi-page document?

17 A Yes, it is.

18 Q And are -- do the canned reports present in a
19 similar fashion as what we see on the screen here --

20 A Yes, they do.

21 Q -- and what we saw when we looked at the first two
22 pages of 402A?

23 A Yes.

24 Q Please direct your attention to Government
25 Exhibit 403. And are you familiar with Government

1 Exhibit 403?

2 A Yes, I am.

3 Q Did you supervise the creation of this document?

4 A I did.

5 Q Does it accurately summarize the information that's
6 in the multi-page document, 403A?

7 A Yes, it does.

8 Q Will referencing it help you explain Mr. Wombold's
9 compensation during the years 2008 through 2012 at Pilot?

10 A Yes, it will.

11 MR. HAMILTON: Again, for the record, the United
12 States offers this as secondary evidence pursuant to *United*
13 *States vs. Kerley*.

14 BY MR. HAMILTON:

15 Q Turning to the first column, 2008, do you see a line
16 that says Commissions -- it's highlighted for Commissions,
17 Current Year?

18 A Yes, I do.

19 Q And for the year ending 2008, what were
20 Mr. Wombold's Commissions Current Year?

21 A 129,996.

22 Q And what was his total for that year?

23 A 522,887.48.

24 Q Looking at Exhibit -- excuse me. Looking at column
25 two thousand -- for 2009, excuse me, what is stated as the

1 Commissions Current Year amount for 2009?

2 A 169,500.

3 Q And what is the grand total compensation for
4 Mr. Wombold in 2009?

5 A 722,468.81.

6 Q Moving to year ending 2010, what is the Commissions
7 Current Year amount for 2010?

8 A 212,500.

9 Q And how about the grand total?

10 A 611,809.55.

11 Q And looking at the year ending 2011, what is the
12 commissions amount for the year 2011 for Mr. Wombold?

13 A 284,140.10.

14 Q And how about the grand total?

15 A 720,744.33.

16 Q And, last, the year ending 2012?

17 A 357,130.58.

18 Q And that's the amount for --

19 A The commissions.

20 Q -- Commissions Current Year?

21 A Yes.

22 Q And what is the grand total amount for 2012?

23 A 1,156,344.62.

24 Q Let's now turn to Government Exhibit 404A. And what
25 is Exhibit 404A?

1 A It is the canned report, the PR260, summary of wages
2 for Heather Jones.

3 Q And was this report generated in the same way that
4 you described 402A?

5 A Yes.

6 Q And what years are covered in 404A?

7 A 2008 through 2012.

8 Q And for which employee?

9 A This is Heather Jones.

10 Q Is this also a multi-page document?

11 A Yes, it is.

12 Q And do the pages in this document present themselves
13 in a similar way as 402A and 403A?

14 A Yes.

15 Q Will you direct your attention to Exhibit 404. And
16 what is Exhibit 404?

17 A This is the summary of all the compensation for each
18 year, 2008 through 2012.

19 Q And does it accurately summarize the information
20 that is provided in the multi-page document of 404A?

21 A Yes, it does.

22 Q And did you supervise the preparation of 404?

23 A Yes, I did.

24 Q Does it accurately summarize the information in
25 404A?

1 A Yes, it does.

2 Q And will it assist you in describing to the jury
3 Ms. Jones' compensation during the years of 2008 to 2012?

4 A Yes, it will.

5 MR. HAMILTON: United States offers this also as
6 secondary evidence pursuant to *United States vs. Kerley*.

7 BY MR. HAMILTON:

8 Q Looking at year end 2008, what is the commissions
9 amount for 2008 for Ms. Jones?

10 A 22,924.54.

11 Q And what was Ms. Jones' total compensation for 2008?

12 A 68,325.86.

13 Q And turning to year 2009?

14 A 25,575.15 for commissions.

15 Q What was that amount? That amount was for what?

16 A Commissions.

17 Q And the grand total?

18 A Was 71,980.27.

19 Q And that was total compensation for the year 2009?

20 A Yes.

21 Q All right. And looking at year ending 2010, what is
22 the Commissions Current Year for 2010 for Ms. Jones?

23 A 39,465.20.

24 Q And what is the total compensation to her that year?

25 A 91,848.76.

1 Q And moving to the year end 2011.

2 A Commissions, 54,666.51.

3 Q And the total for that year?

4 A 106,610.94.

5 Q And then moving to 2012, what's the commission
6 amount for 2012?

7 A 61,283.15.

8 Q And the total for 2012?

9 A 115,348.02.

10 Q Please direct your attention to Exhibit 405A. And
11 what is Exhibit 405A?

12 A It is the same summary report, the PR260, for Karen
13 Mann for periods of 2008 through 2012.

14 Q And is this the same kind of canned report, that
15 term that you used earlier?

16 A Yes.

17 Q And turn to -- let's now pull up Exhibit 405. And
18 are you familiar with Exhibit 405?

19 A I am.

20 Q And is it a summary that relates to Exhibit 405A?

21 A Yes, it is.

22 Q Did you supervise the preparation of this summary?

23 A Yes, I did.

24 Q Does it accurately summarize the data that's in
25 405A?

1 A Yes, it does.

2 Q Will it help you in explaining to the jury
3 Ms. Mann's compensation during the years 2008 through 2012?

4 A Yes, it will.

5 MR. HAMILTON: The United States also offers this as
6 secondary evidence under *United States v. Kerley*.

7 BY MR. HAMILTON:

8 Q Turning to government -- turning to the column for
9 year ending 2008, what is the Commissions Current Year amount
10 for Ms. Mann in 2008?

11 A 49,520.66.

12 Q And what's the total amount for Ms. Mann in 2008?

13 A 92,076.62.

14 Q Going to year ending 2009?

15 A Commissions, 41,207.50.

16 Q And what's the total amount for 2009?

17 A 87,754.56.

18 Q And turning to 2010, what's the commissions amount
19 for Ms. Mann in 2010?

20 A 53,177.31.

21 Q And the total compensation?

22 A 98,981.35.

23 Q And turning to 2011, what's the commissions amount
24 for Ms. Mann in 2011?

25 A 47,160.77.

1 Q And what is the total amount for 2011?

2 A 98,493.96.

3 Q And, last, 2012, what is the commission amount for
4 the year ending 2012?

5 A 67,790.12.

6 Q And the total amount for 2012 for Ms. Mann?

7 A 117,373.53.

8 Q Now we're going to turn to some other documents.

9 Are you familiar with a document called a commission breakdown
10 report?

11 A Yes, I am.

12 Q As I'm turning to those documents I asked you about
13 Mr.-- whether Mr. Hazelwood was still employed there. Let me
14 ask you, is Mr. Wombold still employed with Pilot?

15 A He is not.

16 Q Is Ms. Mann still employed with Pilot?

17 A No, she isn't.

18 Q Is Ms. Jones still employed with Pilot?

19 A No.

20 Q Let's pull up Government Exhibit 409, please.

21 Let me switch to the document camera, please.

22 THE COURTROOM DEPUTY: Yes.

23 (Brief pause.)

24 BY MR. HAMILTON:

25 Q All right. So what is Exhibit 409, that I just --

1 an example of?

2 A This is the commission breakdown that was sent down
3 to payroll to pay.

4 Q To pay what?

5 A To pay the total pay at the bottom, the column Total
6 To Pay.

7 Q And on this commission breakdown report, who is the
8 employee that it relates to?

9 A This is Scott Wombold.

10 Q And let's just describe what Exhibit 409 is before
11 we start talking about some of these documents. Is
12 Exhibit 409 a multi-page document?

13 A It is not.

14 Q Well, if you look at your binder, this is the first
15 page of it --

16 A Oh, yes.

17 Q -- if you look and see.

18 A Yes. The multiple view, yes.

19 Q And are there -- so will you describe Exhibit 409 to
20 the jury, what it contains, looking through your binder, that
21 you've got a printout of it there.

22 A Okay. I have a printout of monthly commissions sent
23 down to pay from July 2011 through -- the last one is
24 November 2012.

25 Q So approximately how many months does that time

1 frame cover for Mr. Wombold?

2 A Seventeen, I think.

3 Q All right. And was it the regular course of
4 business at Pilot for your department to have a role in how
5 these documents were used at Pilot?

6 A How they were used?

7 Q Yes.

8 A Yes.

9 Q And tell us what that is.

10 A When the documents came to the payroll department,
11 we looked at the Total To Pay, and we added that to the next
12 paycheck.

13 Q Do you see the name -- or the entry for "Brian's
14 team" on this commission breakdown report?

15 A Yes, I do.

16 Q And do you understand who Brian is here?

17 A Brian Mosher.

18 Q And looking over here at the column that says
19 Commissions, do you see the column -- do you see that column?

20 A Yes.

21 Q And what is the amount there for "Brian's team"?

22 A That's 8311.69.

23 Q And how, if in any way, did that relate to
24 Mr. Wombold's commission calculation?

25 A It's included in the total we paid.

1 Q And do you recognize the signature on the Approval
2 line here?

3 A Yes. It's Mark Hazelwood.

4 Q Do you see that there is a -- there is an entry in
5 the Description column that's called cap amount for
6 compensation? Do you see that? It's highlighted there.

7 A Yes, I see that.

8 Q And what is the cap amount -- excuse me -- cap
9 amount for Commission. Do you see that?

10 A Yes. It's 36- -- 35,000.

11 Q 35,000 even?

12 A Yes.

13 Q And for this month, is the Total To Pay under, or
14 above, the cap amount for commission?

15 A It's under.

16 Q Before I turn to the next month, what is the -- what
17 is the year and month of this page from Exhibit 409?

18 A This is July 2011.

19 Q Now, directing your attention to the second page of
20 Exhibit 409. And what is this document?

21 A It is the commission breakdown for August 2011 for
22 Scott Wombold.

23 Q And in the Description column do you see an entry
24 there for "Brian's team"?

25 A Yes, I do.

1 Q And who is that?

2 A Brian Mosher.

3 Q And are we going to see "Brian's team" in a number
4 of these documents?

5 A Yes, we are.

6 Q And every time we see it, do you know who that Brian
7 is?

8 A Brian Mosher.

9 Q Do you see, again, there is cap amount for
10 commission in the Description line?

11 A Yes.

12 Q And what is that amount?

13 A 35,000.

14 Q How much?

15 A Sorry. 35,000.

16 Q And how, if in any way, does the "Brian's team"
17 amount affect Mr. Wombold's total commission, Total To Pay
18 amount?

19 A It's included in the total payment.

20 Q And every time we see a "Brian's team" amount in the
21 Commission column, is that true for all of these documents?

22 A Yes, it is.

23 Q And whose signature do you recognize that to be on
24 the Approval line?

25 A Mark Hazelwood.

1 Q And what is the total amount to pay for August of
2 2011 for Mr. Wombold?

3 A 34,127.47.

4 Q Turning to the next page of Government Exhibit 409.
5 What is this document?

6 A This is the September 2011 commission breakdown for
7 Scott Wombold.

8 Q And, again, do we see "Brian's team" there in the
9 description?

10 A Yes.

11 Q And a commission amount associated with that?

12 A Yes.

13 Q And what is the cap amount for Mr. Wombold's
14 commission this month?

15 A 35,000.

16 Q And what is the total that he is paid?

17 A 32,813.36.

18 Q And who is the signature, do you see, on the
19 Approval line?

20 A Mark Hazelwood.

21 Q Turning to the next page of Government Exhibit 409,
22 what is this document?

23 A This is the October 2011 commission breakdown for
24 Scott Wombold.

25 Q And is "Brian's team" in the Description column?

1 A Yes, it is.

2 Q Is there a commission amount associated with that
3 "Brian's team"?

4 A Yes, there is.

5 Q What is Mr. Wombold's commission cap amount this
6 month?

7 A 35,000.

8 Q And what is the Total To Pay?

9 A 32,469.19.

10 Q And do you see the Approval line there?

11 A Yes.

12 Q Can you just read what that says?

13 A Yes. It's Mark Hazelwood's name, signed by Vicki
14 Borden.

15 Q What does it say there? What is written there?

16 A It's written, "Mark Hazelwood."

17 Q And what is below that?

18 A "By VB."

19 Q And who do you understand VB to be?

20 A Vicki Borden.

21 Q All right. Before a commission amount could be paid
22 as monthly compensation, was there an approval process that
23 was required?

24 A Yes, there was.

25 Q And were there certain people who could approve

1 this -- this form?

2 A Yes.

3 Q And was Mark Hazelwood one of them?

4 A Yes, he was.

5 Q Turning to the next page of Government Exhibit 409,
6 what is this document?

7 A This is the November 2011 commission breakdown for
8 Scott Wombold.

9 Q And is "Brian's team" in the Description column?

10 A Yes, it is.

11 Q And is there a commission amount?

12 A Yes, there is.

13 Q What is the cap amount for Mr. Wombold's commission
14 in November of 2011?

15 A 35,000.

16 Q And what is the total to pay him that month?

17 A 25,591.58.

18 Q And at the Approval line, what signature -- what is
19 written there, that you can read?

20 A "Mark Hazelwood."

21 Q And do you see any initials below the line there?

22 A Yes, "VB."

23 Q And who do you understand that to stand for?

24 A Vicki Borden.

25 Q Turning to the next page of Government Exhibit 409.

1 And, again, who is this commission breakdown report for?

2 A This is the December 2011 for Scott Wombold.

3 Q Do you see in the Description column "Brian's team"
4 again?

5 A Yes.

6 Q Is there a commission amount in the Commission
7 column associated with "Brian's team"?

8 A Yes, there is.

9 Q And what is Mr. Wombold's cap amount for commission
10 this month?

11 A 35,000.

12 Q And what amount is -- what's the total amount paid
13 to Mr. Wombold this month?

14 A 32,315.59.

15 Q And in the Approval line, what do we see written
16 there?

17 A Mark Hazelwood.

18 Q And any initials below the line?

19 A "VB."

20 Q And who is that?

21 A Vicki Borden.

22 Q The next page of Government 20- -- of Government
23 409, what is this document?

24 A This is the January 2012 commission breakdown for
25 Scott Wombold.

1 Q Is "Brian's team" in the Description column?

2 A Yes, it.

3 Q Is there a commission amount associated with
4 "Brian's team"?

5 A Yes, there is.

6 Q What is the cap amount for Mr. Wombold's commission
7 for January of 2012?

8 A 35,000.

9 Q And what is the Total To Pay amount?

10 A 31,728.38.

11 Q And do you recognize the signature on the Approval
12 line?

13 A Yes. That's "Mark Hazelwood."

14 Q Turning to the next page of Government Exhibit 409,
15 what is this document?

16 A This is the February 2012 commission breakdown for
17 Scott Wombold.

18 Q And is there an entry in the description for
19 "Brian's team"?

20 A Yes, there is.

21 Q And is there a commission amount associated with
22 that?

23 A Yes, there is.

24 Q What is the cap amount for Mr. Wombold's commission
25 in February of 2012?

1 A 35,000.

2 Q What is the total amount to pay Mr. Wombold for
3 commissions in February of 2012?

4 A 21,301.39.

5 Q And do you recognize the signature there?

6 A Yes. It's "Mark Hazelwood."

7 Q This is not the next page. I'm going to skip over a
8 few months, in Government Exhibit 409, to June of 2012. Would
9 you tell the jury what this document is.

10 A This is the June 2012 commission breakdown for Scott
11 Wombold.

12 Q On a number of these documents we've seen the number
13 59. Do you know what that number means?

14 A That's Scott Wombold's employee number.

15 Q Do you see the Description column on this document?

16 A Yes.

17 Q And do you see an entry for "Brian's team"?

18 A Yes, I do.

19 Q And is there a commission amount associated with
20 "Brian's team" here?

21 A Yes, there is.

22 Q For the month of June 2012, what was Mr. Wombold's
23 cap amount for commission?

24 A 35,000.

25 Q And what is the original Total To Pay amount that's

1 stated on this form?

2 A 29,409.11.

3 Q Does this document indicate whether or not that
4 original amount was adjusted?

5 A Yes, it does.

6 Q And to what was it adjusted?

7 A 30,000.

8 Q All right. And do you recognize the signatures
9 approving that?

10 A Yes. It's "Mark Hazelwood."

11 Q For all of the months that are included in
12 Government Exhibit 409, was Brian Mosher's team a description
13 item in Mr. Wombold's commission breakdown reports?

14 A Yes, it was.

15 Q And for all of the commission breakdown reports that
16 make up Government Exhibit 409, was there a commission amount
17 that was associated with Brian Mosher's team?

18 A Yes, there was.

19 Q And in those instances, how did that factor in, if
20 at all, with Mr. Wombold's total compensation?

21 A It was included.

22 Q I'm going to return to a document. I don't believe
23 I heard something correctly when you said it, and I want to go
24 back over it. I realize that these letters and these digits
25 are small. Would you take a look again at -- it's Page -- it

1 has what's called a Bates number on the bottom left-hand
2 corner that is identified as Trial_3152. You can also see
3 "Page 20" in the center of it. And it's part of Government
4 Exhibit 409. I'm placing it back on the document camera.

5 A Okay.

6 Q And I want you to focus your attention again to the
7 Total To Pay amount. Do you see the Total To Pay amount? I'm
8 going to-- Would you look at that-- That figure, and by
9 looking at the -- look at the figure that's marked through.

10 A Uh-huh.

11 Q And I ask you to do that, to look at the figure
12 that's three entries above it.

13 A Okay.

14 Q And do you see that that -- what is the figure
15 that's three entries above that?

16 A Yes. It's 20,489.11.

17 Q And just so that the jury can see what the
18 Description entry is, is that adjusted for percent as --
19 adjusted for percent time to quota? Do you see that?

20 A Yes, I do. Yes.

21 Q And that amount is, again, what?

22 A It's 20,489.11.

23 Q So what was the Total To Pay amount for this -- this
24 commission breakdown report?

25 A Before the adjustment?

1 Q Yes.

2 A It was 20,489.11.

3 Q So was it \$20,489.11?

4 A Yes.

5 Q And did you previously say that it was approximately
6 29,000?

7 A Yes, because that line is drawn right through the
8 middle of the zero and I thought it was an eight.

9 Q So it was -- so, again, just to make a -- so we can
10 have a complete paragraph about this --

11 A Okay.

12 Q -- what was the \$20,489.11 amount adjusted to on
13 this form?

14 A 30,000.

15 Q And who made the adjustment?

16 A Mark Hazelwood.

17 Q Let me direct your attention now to Government
18 Exhibit 410. And like Exhibit 409, is Government Exhibit 410
19 a multi-page document?

20 A Yes, it is.

21 Q And what does Exhibit 410 consist of?

22 A This is the commission breakdown report, monthly
23 report for Heather Jones.

24 Q And can you give us the time frame of commission
25 breakdown reports that are included in Government Exhibit 410?

1 A Yes. It's February 2008 through November -- no,
2 through June of 2012.

3 Q So approximately how many -- approximately how many
4 commission breakdown reports are included in Government
5 Exhibit 410?

6 A Fifty-one.

7 Q We're not going to go through all 51.

8 A Yeah. Okay. Good.

9 Q Let me show you-- We're going to look at one as an
10 example.

11 A Okay.

12 Q And let me pull that one up, which is -- this is one
13 of the commission breakdown reports that is within Government
14 Exhibit 410.

15 MR. HAMILTON: Could we switch back to the laptop,
16 please?

17 THE COURTROOM DEPUTY: Sure.

18 BY MR. HAMILTON:

19 Q And on the screen can you -- do you see, behind what
20 has been highlighted, what the month and year is?

21 A December 2008.

22 Q And this page is Trial 3168 within Government
23 Exhibit 410. Do you see, in the Description column, Brian's
24 direct bill, Brian's restricted network, Brian's wholesale?

25 A Yes, I do.

1 Q And do you see -- and who do you understand in
2 this -- for this description the "Brian" to be?

3 A Brian Mosher.

4 Q Do you see whether or not there are any commissions
5 associated with those Brian Mosher-related descriptions?

6 A Yes, there are.

7 Q How, if in any way, did those Brian Mosher-related
8 commissions relate to the total commission that's paid to
9 Heather -- that's paid to Heather Jones this month?

10 A They're included in that total.

11 Q And in each of the -- I believe you identified
12 approximately 51 commission breakdown reports?

13 A (Moving head up and down.)

14 Q And have you reviewed all 51 before your testimony
15 today?

16 A Yes, I have.

17 Q In each of the 51 commission breakdown reports, is
18 there a description that relates to Brian Mosher's commissions
19 in each one of those commission breakdown reports?

20 A Yes.

21 Q And each of the commission breakdown reports where
22 Brian Mosher's -- where there is a description related to
23 Brian Mosher, how, if in any way, do the commissions related
24 to the Brian Mosher description relate to Ms. Jones' total
25 compensation in each of those 51 commission breakdown reports?

1 A It's included in each of those payments.

2 Q Let's now turn to Government Exhibit 411. Will you
3 please tell the jury what Government Exhibit 411 is.

4 A Commission breakdown sheets for Karen Mann.

5 Q And would you tell us what months for Karen Mann are
6 included in Government Exhibit 411?

7 A Yes. November 2008 through December of 2011.

8 Q Would you look at that -- let me ask you to look at
9 Exhibit 411 again, and would you look at the first page of it,
10 which is -- it's marked as Trial 3209, and can you tell us
11 what the first month is there?

12 A November 2008.

13 Q Then go forward to what's marked as Trial 3216.

14 A That...

15 Q And --

16 A June 2009.

17 Q So let's focus on -- on these pages first.

18 A Okay.

19 Q And we'll pull up an example from that range. So
20 this range is November of 2008 through June of 2009. That's
21 what I want to focus on first.

22 A Okay.

23 Q So right now on the screen we have zoomed in on a
24 portion of the November 2008 Karen Mann commission breakdown
25 report. Is that right?

1 A Yes.

2 Q And do you see a Description entry related to "Tim
3 Prins direct bill, Tim Prins restricted, Tim Prins wholesale"?

4 A Yes, I do.

5 Q And is there a commission amount associated with
6 those Tim Prins-related entries?

7 A Yes, there is.

8 Q How, if in any way, did the commissions related to
9 Tim Prins' entries relate to Ms. Mann's total compensation
10 that month?

11 A It's included in the total payment.

12 Q And during the period November -- if you could look
13 at the documents that we are focusing on that are part of 411,
14 during the period November of 2008 through June of 2009, do
15 you see a description in each of those related to Tim Prins?

16 A Yes.

17 Q And do each of those Tim Prins descriptions in this
18 series of documents have a commission amount associated with
19 them?

20 A Yes, they do.

21 Q And how did those Tim Prins commission amounts in
22 each of those commission breakdown reports relate to
23 Ms. Mann's total compensation?

24 A They were included in each of the total payments.

25 Q All right. Now, I want to direct your attention to

1 additional pages in Government Exhibit 411. And looking at
2 Page -- starts with Trial 30- -- 3217, do you see that?

3 A Yes, I do.

4 Q And it continues through Trial 3223. Do you see
5 that?

6 A Yes.

7 Q And what is the time frame that's covered by these
8 commission breakdown reports?

9 A It's June 2011 through December of 2011.

10 Q Let's pull an example up of those. So what we're
11 looking at here is the commission breakdown report for
12 Ms. Mann from June of 2011. Do you see that?

13 A Yes, I do.

14 Q And this one that we're focusing on is Trial -- is
15 Page Trial 3217?

16 A Yes.

17 Q Do you see a description in this commission
18 breakdown report that relates -- descriptions that relate to a
19 J-O-N, Jon, and has an apostrophe S.

20 A Yes, I do.

21 Q So it says J-O-N-apostrophe-S, Jon's. Do you
22 understand who that is?

23 A Jon Sigurdson.

24 Q What was the last name?

25 A Sigurdson.

1 Q And for each of the description entries related to
2 Jon Sigurdson, is there a commission amount associated with
3 that?

4 A Yes, there is.

5 Q And is there a Jon Sigurdson, Sigurdson, commission
6 amount that's in each of the commission breakdown reports from
7 the period June of 2011 through December of 2011?

8 A Yes, there is.

9 Q And for each one of those Jon Sigurdson
10 commission-related entries, how, if at all, did that affect
11 Karen Mann's total compensation for those months?

12 A They're included in the total payment for each of
13 those months.

14 MR. HAMILTON: May I have just one moment, Your
15 Honor?

16 THE COURT: You may.

17 (Off-the-record discussion between government
18 counsel.)

19 MR. HAMILTON: No further questions, Your Honor.

20 THE COURT: Cross-examination?

21 CROSS-EXAMINATION

22 BY MR. HARDIN:

23 Q Good morning.

24 A Good morning.

25 Q I don't think we've met before, have we?

1 A No, we haven't.

2 Q My name's Rusty Hardin. How are you?

3 A I'm good, Rusty. How are you?

4 Q I'm good. I have just a few questions for you.

5 A Okay.

6 Q These charts that we've gone over, can you help me
7 separate out what you have been testifying about that you
8 prepared as opposed to what may have already existed in the
9 form the jury is seeing?

10 A The PR --

11 Q Do you understand my question?

12 A Yes, I think I do.

13 Q Okay. Help me out.

14 A The PR260, that comes out of the payroll system in
15 that form. We enter parameters in a report, like a query, and
16 it spits out in the exact form you saw.

17 Q Okay. All right. So -- and you didn't have these
18 form breakdowns for Mr. Hazelwood. Is that right?

19 A That's correct.

20 Q Okay. So if we start with Government Exhibit 409.

21 Could we have that, please. And, Stacey, can we
22 concentrate on where -- first up at the top.

23 So this would be, like, July sales, this would be a
24 document that is kept in this form by Pilot, is it?

25 A Yes, it is.

1 Q Okay. And then you have, over here on the left,
2 "Brian's team" and "Vince's team." Is that correct?

3 A That is correct.

4 Q And that would be because both of those teams came
5 under Mr. Wombold's supervision at that time. Is that
6 correct --

7 A That --

8 Q -- or is that something you would know one way or
9 the other?

10 A I would not know that from memory. I would have to
11 look back and see. But I do know that he got commission based
12 off of them.

13 Q Okay. And so would it be a fair assumption on your
14 part and our part that that's because those people -- those
15 teams were under the supervision of Mr. Wombold at that time?

16 A I could assume that, but I don't know it for a fact.

17 Q Well, let's assume for a second that in July of 2012
18 or around that time, if I move forward to--

19 Let's do next -- let's do June 2012, which would be
20 this page number down at the bottom, Stacey, 3152 that the
21 government showed.

22 A Yes.

23 Q Do you remember this? You remember going over this
24 document, correct?

25 A Yes, I do. Yes.

1 Q You notice, do you not, that as of June 2012,
2 Brian's team and Vince's time, together, are still listed
3 under Mr. Wombold? Would you agree?

4 A Yes. Yes.

5 Q All right. Then if we go to the very next one,
6 3153, representing July 2012 sales, do you see now it's only
7 listing Mr. Mosher under Mr. Wombold?

8 A Yes, I see that.

9 Q Would it be a fair conclusion, based on your looking
10 at these records, that that would indicate that Mr. Greco was
11 no longer under the supervision of Mr. Wombold?

12 A I could only conclude factually that he didn't get
13 commissions based on Greco.

14 Q I guess that's a fair way to put it for your
15 testimony.

16 A Yes.

17 Q As far as the extent of your knowledge is, all you
18 know is, is that as of July 2012 Mr. Wombold was not receiving
19 anything based on the commissions due Mr. Greco?

20 A Yes, that is correct.

21 Q Okay. That's the only thing you're really
22 comfortable with?

23 A Yes.

24 Q All right. Now, I want you, though, to look off of
25 these numbers the government asked you for, and let's start at

1 the first page. I'll go kind of quickly with you, but let's
2 go -- still on 409, the first page, which would be 3141.
3 Thank you.

4 If we look at these figures on "Brian's team," I'm
5 going to have you just try to remember with me these numbers
6 and see if this works. I'm not going to ask you the specific
7 ones with the occasions. And here's what I mean. On as of
8 July 2011 sales, would you agree with me that reflects Vince
9 Greco's team was more -- responsible for more profit than
10 Mr. Mosher's team?

11 A Yes.

12 Q All right. So that's going to be Number 1 time, as
13 we count. I'm going to count the number of times Mr. Greco --
14 through you, if we can, that Mr. Greco's team was responsible
15 for more profit—are you with me?—than Mr. Mosher's team. So
16 all you're going to have to remember is the number of times
17 that's true.

18 A Yes. Okay.

19 Q All right. So that's one. Let's go, please, then,
20 if we can, to August of 2011 sales, the next one. You see
21 here, do you not, again, Mr. Greco's team is responsible for
22 more profit than Mr. Mosher's? Is that a fair statement?

23 A Yes, I do.

24 Q Go to the next page, please, which would be
25 September. So that's two times. September 2011, again,

1 though it's not that great much, still Mr. Greco's team is
2 responsible for more profit than Mr. Mosher's?

3 A That is correct.

4 Q That's Number 3. Go to October 2011. Is it true
5 again that Mr. Greco's team's responsible for more?

6 A That is correct.

7 Q That's four times. Go to November. Again,
8 Mr. Greco's team is responsible for more profit. Can you see?

9 A Yes, I see that.

10 Q All right. That's five, I believe, isn't it? Now,
11 if we go to December of 2011, this is the first time, is it
12 not, that Mr. Greco's team is a little bit less -- not much,
13 but a little bit less than Mr. Mosher's, correct?

14 A In these documents, yes.

15 Q All right. So I guess we're five to one so far,
16 right? And then if we go to January 2012, the next page,
17 Mr. Mosher's team is responsible for more profit there,
18 correct?

19 A Uh-huh. Yes.

20 Q Five to two. Let's go to February. Mr. Mosher's
21 team is responsible for a little bit more profit, correct?

22 A That is correct.

23 Q Five to three. Let's go to -- let's go to March.
24 Now it's back up. Mr. Greco's team, in March of 2012, is
25 responsible for more profit, right?

1 A Yes.

2 Q Six to three.

3 A Six to three.

4 Q April, Mr. Greco's team, again, responsible. Seven
5 to three, correct?

6 A Yes.

7 Q May, Mr. Greco's team responsible for more, right?

8 A Yes.

9 Q Eight to three. June, Mr. Greco's team responsible
10 for more. Nine to three. Is that right?

11 A Yes.

12 Q July, we no longer can make the comparison, can we,
13 because Mr. Greco is not listed as somebody whose commissions
14 would affect Mr. Wombold's commissions?

15 A That is correct.

16 Q All right. So how did we end up there, nine to
17 three or ten to three?

18 A Nine, I think. Nine to three.

19 Q All right. Now, there's one other area that I want
20 to -- one other area that I want to mention with you.

21 (Brief pause.)

22 MR. HARDIN: May I have just a moment, Your Honor?
23 I'm sorry.

24 THE COURT: Yes.

25 (Brief pause.)

1 BY MR. HARDIN:

2 Q When you were getting together, are these -- is this
3 document that you and I just went over -- was that already in
4 creation when the government asked you to do this, in this
5 form?

6 A Yes. That was stored in our systems.

7 Q All right. So what's -- now, but I'm trying to
8 figure out, did you make this chart based on figures stored in
9 the system, or did you go in and it existed just as it appears
10 before us?

11 A As we received these documents and paid them, we
12 scanned them into our document management system. So it was
13 retrieved from that document management in its form that we
14 received.

15 Q And this is the form you received it in --

16 A It is.

17 Q -- from the document?

18 A It is.

19 Q This is not something you created?

20 A No, it is not.

21 Q All right. And you never checked these figures for
22 accuracy, I take it.

23 A I have checked all of the payments for accuracy.

24 Q Pardon me?

25 A I have checked every payment for accuracy.

1 Q Okay. So did you check payments for accuracy for
2 what they were entitled to, or what they were paid?

3 A I wouldn't know what they were entitled to.

4 Q All right. That's what I mean. So you didn't go
5 back and do any check to see if these figures were correct on
6 here?

7 A No.

8 Q What you did is check to see if these figures
9 reflected what people were paid?

10 A Yes, if we paid what the document told us to pay.

11 Q All right. And -- but you don't have any idea and
12 no -- I take it you have no knowledge of an audit to see if
13 these figures -- the underlying basis for these figures is
14 correct?

15 A Of the calculations themselves?

16 Q Yes.

17 A No, I do not.

18 Q Okay. Fine. Thank you. I want to go now to the
19 exhibit we did with Mr. Hazelwood.

20 Can I have Government Exhibit 402, please?

21 Now, is this a document you created?

22 A Yes.

23 Q All right. And this was created at the government's
24 request. Is that correct?

25 A Yes.

1 Q How many people did you create these figures for, or
2 these charts for?

3 A I created it for everyone on the list. So I'm not
4 sure exactly how many.

5 Q All right. So was it more than the four people that
6 you have gone over with here today?

7 A I really can't say unless I go back and look at all
8 the documents that we created.

9 Q Would you remember any of the names --

10 A As far as what we've created --

11 Q -- for this kind of chart?

12 A I really -- the only ones I remember are these four,
13 because they've been the most recent.

14 Q The most recent request?

15 A Yes.

16 Q All right. So if we go back, do you recall what
17 year -- I believe you said you started 2002?

18 A Yes, I did.

19 Q What year do you recall you first got a request from
20 the government to create the kind of chart that exists in
21 Government 402?

22 A I really don't recall because there was multiple
23 requests.

24 Q Can you give me an idea of how many requests?

25 A I really can't. I would have to be at my desk where

1 everything is stored.

2 Q All right. Can we do it this way: Was it more than
3 five?

4 A More than five requests?

5 Q Yes.

6 A Do you mean individual requests, or --

7 Q Yes.

8 A -- collective?

9 Q Collective people.

10 A I would -- I hate to speculate something that I
11 really don't remember.

12 Q All right. Was it considerably more than these four
13 that you've been asked to do this for?

14 MR. HAMILTON: Objection. Asked and answered.

15 THE COURT: Overruled.

16 BY MR. HARDIN:

17 Q Was it?

18 A I would not say considerably.

19 Q I'm sorry. I didn't --

20 A I would not say considerably, but I really don't
21 remember.

22 Q Okay. All right. Were you ever asked to do it for
23 Vincent Greco?

24 A I don't recall if I was.

25 Q Would it be a fair statement that you don't have any

1 memory that you were, you're just not comfortable absolutely
2 saying for sure, though?

3 A I don't have a memory, and I'm not comfortable
4 saying something I don't remember.

5 Q All right. That's fair enough. But you sit there
6 now and have no memory of being asked to do it for Mr. Greco?

7 MR. HAMILTON: Objection. Asked and answered.

8 MR. HARDIN: No, it is not.

9 THE COURT: Sustained.

10 MR. HARDIN: In all due respect, Judge-- Did the
11 Court sustain?

12 THE COURT: Yes.

13 BY MR. HARDIN:

14 Q Have you ever researched the kinds of figures that
15 you were presenting here for Mr. Hazelwood with Mr. Greco?

16 A Not in my recollection.

17 Q Okay. Now, if in fact we look at Mr. Hazelwood's
18 compensation, I believe it began, your testimony, did it not,
19 with you -- with them introducing through you his agreement
20 that he had. Do you recall that?

21 A Yes, I do.

22 Q And had you -- did you -- when you -- did you go
23 over that agreement yourself?

24 I'm looking at Exhibit 401, please, Stacey,
25 Government 401.

1 Do you recall being asked about this exhibit?

2 A I do.

3 Q And the date on this exhibit is what?

4 A It is the 6th of March, 2008, with February marked
5 through.

6 Q And do you recall on this -- when you looked at this
7 exhibit, did you go back and look at previous agreements of
8 this?

9 A I have several agreements, but I only recall looking
10 at this one.

11 Q Are you aware that he started with the company in
12 1985?

13 A Yes.

14 Q All right. And through your research did you notice
15 that his first agreement like this was back in 1988?

16 A I would not have had a copy of that one because I
17 wasn't there at the time.

18 Q Okay. Well, did you -- wouldn't -- the company
19 would have had such a copy?

20 A Right. Yes.

21 Q You just didn't have any need to go back and look
22 for it?

23 A Correct.

24 Q All right. You could have recovered it if you were
25 asked to?

1 A If I needed to, I could have.

2 Q And were you asked -- what was the nature of the
3 request that led you to re- -- look at and recover this
4 particular agreement? What were you asked to do?

5 A The last time I was asked to pull this agreement, or
6 the first time, I guess, in recent history, was to make sure
7 the payments were being made. So that would have been when
8 Mr. Hazelwood was still employed.

9 Q Okay. Now, were you aware that these agreements
10 began in 1988? You said yes?

11 A In 1988? I knew that he had agreements. I have not
12 seen them.

13 Q Okay.

14 A And I only knew that from hearsay.

15 Q Okay. Do you have any idea what the net profit was
16 in 1988 when these agreements began?

17 A No, I do not.

18 Q Would you agree with me that this agreement gives
19 him a percentage of the net profits of the company?

20 A Yes, of the after-tax.

21 Q After-tax. After-tax net profits of the company?

22 A Yes.

23 Q And are you aware of other agreements with
24 executives, any executives, that exist similar to that, not
25 necessarily the percentages, but that -- the concept,

1 namely -- namely, that the employee gets a percentage of the
2 company's net profits?

3 A I am not.

4 Q All right. Now, let me make sure I understand.
5 When you say you're not, does that mean you think there are
6 not, or you just don't know one way or the other?

7 A I just don't know.

8 Q Okay. Fair enough. And you weren't asked to look
9 at whether anybody else -- or the government -- in preparation
10 of your testimony, did the government ask you to look and see
11 if anybody else had a -- an agreement that gave them a
12 percentage of the net profits?

13 A I don't recall being asked.

14 Q All right. Do you have any knowledge one way or the
15 other as to whether Mr. Parent, the present president, has
16 such an agreement?

17 MR. HAMILTON: Objection. Relevance.

18 THE COURT: What's the relevance?

19 MR. HARDIN: The government has, in previous
20 situations, contended this was unique to Mr. Hazelwood, not
21 before this witness, but I just simply want to address it with
22 this witness. I don't know who else. I guess we could call
23 people later, but --

24 THE COURT: So it would be rebuttal. I don't recall
25 that.

1 Mr. Hamilton, did the government put on evidence
2 that this type of agreement was unique with Mr. Hazelwood?

3 MR. HARDIN: I stand-- Excuse me. I stand to be
4 corrected by the government. I just don't have it in front of
5 me. I seem to have a memory that the government made such a
6 suggestion in their opening statement. I could be wrong.

7 THE COURT: I'm asking Mr. Hamilton now. If
8 Mr. Hamilton says that they have, then I think it's
9 appropriate. I just don't recall that. The trial's gone on
10 for a long time. There have been a lot of witnesses and a lot
11 of evidence, so I'm not able to keep track of every single
12 thing that's gone on.

13 Mr. Hamilton?

14 MR. HAMILTON: Your Honor, I think that the best
15 thing for us to do -- I can't quote the entire transcript in my
16 head at one time, either. I'm going to withdraw the objection.

17 THE COURT: Very well. So the question was about
18 Mr. Parent, whether Mr. Parent has such an agreement.

19 THE WITNESS: I am not aware of any.

20 BY MR. HARDIN:

21 Q And does that mean -- again, I want to make sure
22 we're clear. Does that mean you just don't know, or that you
23 don't think he does?

24 A I'm not aware of it, so I haven't received it or had
25 to pay anything on it.

1 Q You haven't seen anything on it?

2 A Right.

3 Q Okay. Fair enough.

4 Could I have back up, please, that agreement, which
5 was 402 -- excuse me, 401.

6 Now, if the company -- would you agree with me that
7 if these -- this kind of an agreement began in 1988, it would
8 be at a time, based on your looking at records in the past --
9 I realize you weren't there, but having looked at records over
10 time, it was at a time when the company was making nowhere
11 near as much money as it's been making in recent years. Would
12 you agree?

13 MR. HAMILTON: Objection, Your Honor. Lack of
14 foundation.

15 THE COURT: I think that's a matter of common sense.
16 Overruled.

17 A I would guess -- I would only have to guess that the
18 fact the company was not as large.

19 Q Well, not only that, when you joined in 2002, by
20 2010, in the records that you were responsible for in
21 reviewing, would you agree that the net profit of the company
22 considerably increased from the years that you joined the
23 company until you were asked to start doing these charts?

24 A I would say that the company's profits increased,
25 yes.

1 Q Right. So three and a half percent in 1988 might be
2 a very much smaller figure compared to 2012. Would you agree?

3 A I could assume so, based intellectually on the
4 finances.

5 Q Were you trained to be an accountant?

6 A No. I'm a marketing major.

7 Q Are you really? So how did you -- how did they get
8 you into this part of it?

9 A Just-- I don't know.

10 Q All right. Well, now, do you happen to know from
11 looking through records that actually there were four of these
12 agreements, like, every ten years Mr. Hazelwood and
13 management, with Mr. Haslam, would sign a new agreement?

14 A I wouldn't know that unless it was time for me to
15 make a payment on it.

16 Q Okay. So -- but you joined in 2002 --

17 A Uh-huh.

18 Q -- and there would have been an agreement from --
19 well, I guess every ten years there would be one, in '98,
20 right? 2006? Do you recall having to make a payment in
21 2006 --

22 A Well, some --

23 Q -- or during those years?

24 A I can't recall every payment ever made. But as far
25 as me getting the agreement, I may or may not have gotten part

1 of the agreement. I may have just gotten a payment to make.

2 Q All right. So let's do it this way: Would you
3 agree with me that before this agreement of 2008, you had been
4 making payments to Mr. Hazelwood on an annual basis based on
5 net profits of the company?

6 A Yes.

7 Q Fair enough. You just are not comfortable with
8 which years the previous agreements were?

9 A I just don't want to say something I don't factually
10 know myself.

11 Q I think that is apparent to us all. Okay? Now, I
12 want to go, please, to 402. There is-- Would you agree with
13 me that the bulk of his compensation is from -- during this
14 period of time is what's called the Growth Partner bonus?

15 A Yes.

16 Q Would you agree?

17 A Yes.

18 Q And then the second would be right under that. So
19 if you could highlight those two for me. Well, actually
20 highlight the first six entries here, if you would, and let's
21 stop at Growth Partner dividend payout. All right. There you
22 go.

23 Now, we're going to get, are we not, if we step
24 down, that in 2012 that was more than double what his
25 previous -- even at its height -- he had a big year in '09,

1 but almost double that, even that other previous year, in
2 2012, and in 2012 it was more than double than it had been for
3 2011. Is that a fair statement?

4 A Yes.

5 Q All right. Now, when we look at --

6 And then, Stacey, if you could add to those, as you
7 highlight it, exactly that. Thank you.

8 So his gross pay was almost 26 1/2 million, wasn't
9 it?

10 A In 2012, yes.

11 Q A whole bunch of money, would you agree?

12 A Yes.

13 Q All right. And do you happen to remember -- well,
14 let me -- let's look at this. Growth Partner bonus, that says
15 a distribution that is dictated by either the board or
16 Mr. Haslam, was it not?

17 A Yes.

18 Q And do you recall, did everybody that had anything
19 to do with the profits of the company got a pretty big bonus
20 that year, 2012?

21 A Well, that would be a broad statement, but
22 intellectually, again, I would have to say, if I had Growth
23 Partner points granted--

24 Q And the reason for that was, was it not, was that
25 there was, like, a 750 million bonus declared, or

1 distribution, connected with Mr. Haslam buying the Cleveland
2 Browns? Do you recall that?

3 A I would not be aware of that.

4 Q Were you aware of that when he did, one way or the
5 other?

6 A I know he did, but I don't remember the year.

7 Q All right. But would you agree with me that what
8 that reflects, that Growth Partner bonus of \$14 million,
9 that's straight ordinary income that was reflected in a bonus
10 that Mr. Hazelwood got because of his entitlement to three and
11 a half percent?

12 A That's included in that, yes.

13 Q All right. And so that's why you have this
14 extraordinary jump, is it not, is because that really large,
15 large distribution for which he would get a certain percentage
16 of?

17 A What I -- from what I know, what I would say is it
18 jumped because the net profit jumped.

19 Q Pardon me?

20 A He would get an increase of the net profit, because
21 of the three and a half percent.

22 Q Right. Okay. Now, through all of this, do you
23 know -- when you joined in 2002, do you know what
24 Mr. Hazelwood's position was?

25 A I really don't.

1 Q All right. Is it a safe assumption on my part that
2 if I were to ask you what the successive years of net profits
3 were, or for even, like, every four or five years or every ten
4 years, that is not a figure that you would know?

5 A That's right. I would not know.

6 MR. HARDIN: Okay. May have I just a second, Your
7 Honor? I think I'm just about through.

8 THE COURT: You may.

9 (Off-the-record discussion between defense counsel.)

10 MR. HARDIN: Your Honor, I want to tender to the
11 government, if I may, Joint Defense Exhibit 181 and 182, which
12 are in the production by the government in this matter, but
13 it's not been listed as an exhibit, and it has to do with the
14 payouts of Mr. Greco over a certain period of time, in 2013.
15 Before I say any more about the exhibits, may I have the
16 Court's permission to give copies to the government and let
17 them look to see if they have an objection?

18 THE COURT: Yes.

19 (Brief pause.)

20 MR. HAMILTON: The United States objects to the
21 relevance of these commission breakdown reports. My first
22 objection is, it goes beyond the scope of direct examination.
23 The commission breakdown reports here are for a person that was
24 not discussed on direct examination, Number 1. And Number 2,
25 they're not relevant.

1 THE COURT: Looks like there's an objection to the
2 documents then. I don't recall on direct examination the
3 witness discussing Mr. Greco. My memory may be mistaken, but I
4 don't --

5 MR. HARDIN: I think your memory -- I think your
6 memory is correct.

7 THE COURT: That means, then, the Court is sustaining
8 the objection.

9 MR. HARDIN: Thank you, Your Honor.
10 Thank you, ma'am.

11 THE WITNESS: Thank you.

12 BY MR. HARDIN:

13 Q Oh, by the way, would there be anyone else -- would
14 you be the logical person, if the Court were to allow it under
15 other circumstances, to discuss Mr. Greco's compensation?
16 Would you be the logical person to be able to do that?

17 A I would be the one to pull the data out of the
18 system.

19 MR. HARDIN: Thank you very much.

20 THE COURT: And before he sits down, will you be
21 available for the next month or six weeks or so in case someone
22 needs you? You won't be taking a vacation or out of the
23 country or anything like that, will you?

24 THE WITNESS: No. The only thing I have is, February
25 the 21st, a trip for the company, but otherwise I'll be...

1 THE COURT: (Moving head up and down.)

2 MR. HARDIN: Thank you, Judge. That's all I have.

3 MR. RIVERA: Your Honor, do -- I see the Court
4 looking at the clock. Do you want to take a break at this
5 point?

6 THE COURT: Why don't we go ahead and get started.

7 CROSS-EXAMINATION

8 BY MR. RIVERA:

9 Q Good morning, Ms. Whaley.

10 A Good morning.

11 Q My name's David Rivera, and I'm counsel for Scott
12 Wombold.

13 A Okay.

14 Q How are you?

15 A I'm good. How are you?

16 Q Good. Thank you. Ms. Whaley, this might be a point
17 of clarification for the Court. I do want to ask you some
18 questions about Vince Greco. I anticipate an objection from
19 the government.

20 MR. HAMILTON: Objection-- Should I wait?

21 THE COURT: There's nothing to object to yet. He
22 hasn't asked the question. He just made a statement.

23 MR. HAMILTON: I thought it was invited, Your Honor.

24 MR. RIVERA: It was. It was.

25 BY MR. RIVERA:

1 Q Ms. Whaley, I want to show you Government's
2 Exhibit 409.

3 A Yes.

4 Q I'm going to improve that a little bit. Do you see
5 on this document that's been introduced by the government as a
6 commission breakdown report -- do you see that?

7 A Yes, I do.

8 Q And in this document the government highlighted
9 certain sections. And clearly in this document the name
10 "Vince's team" is referenced in this document. Do you see
11 that?

12 A I do.

13 Q And in the succeeding several pages on this
14 document -- and here it's referenced July of 2011, do you see
15 that?

16 A I do.

17 Q And if you flip to the next document, which is
18 referenced August of 2011, "Vince's team" also appears.

19 A Correct.

20 Q Is that correct? And if you continue -- and I won't
21 go through all of them, but is it safe to say that Vince's
22 team is referenced in all of the documents from July of 2011
23 to May of 2011? Vince's team is referenced on this document.
24 Do you see that?

25 A Yes, I do.

1 Q All right. Do you know who Vince is? Do you know
2 his last name?

3 A I would assume.

4 Q Vince Greco?

5 A Yes. I haven't looked it up, which, the way I
6 determine who it is is by looking in the payroll system and
7 matching.

8 Q Okay. Are you aware-- Withdrawn. Is it fair to
9 say, as it relates to these commission breakdowns, that
10 supervisors would receive commissions that were paid to teams
11 that they supervised?

12 A I can't make that correlation just by looking at
13 this document. I would have to be looking in the payroll
14 system to see at that time who supervised who. All I know is
15 what it says on this document, because that's all we received.

16 Q Okay. Maybe my question wasn't very clear. So let
17 me see if I can rephrase that. Here it's clear that Scott
18 Wombold is receiving a commission that is based on the
19 commission that was received by the two teams that he
20 supervised. Is that correct? Here, did Brian's team receive
21 a commission of approximately 8,166?

22 A Uh-huh.

23 Q And that's carried over to a commission to Scott
24 Wombold. Is that correct?

25 A It's correct he's receiving those commissions. I

1 just can't remember if he was supervising them at that time.

2 Q Okay. Do you know of any other reason why Scott
3 Wombold would receive a commission from Brian's team and
4 Vince's team if he wasn't supervising them?

5 A I don't know that, because it comes down to us to
6 pay the total. We don't do any of the calculations up above
7 it.

8 Q So you're not familiar with the preparation of this
9 document or -- or what -- why these numbers are even here. Is
10 that fair?

11 A I know they're part of the calculation in the total
12 payment of the commissions for Mr. Wombold.

13 Q All right. So it's -- it's fair to say that your
14 only role in payroll, and the role of the people that you
15 supervise, is to receive this commission breakdown and pay
16 what is reflected in the Total To Pay line. Is that fair?

17 A We also have to determine the right approval is on
18 it.

19 Q And right approval, you would determine that by
20 looking at a signature?

21 A Well, we have a two-up hierarchy. So in this case
22 it would be Mark Hazelwood.

23 Q All right. And how would you determine that? By
24 his signature?

25 A By his signature being on it. And by knowing that

1 that group reported up to him.

2 Q Okay. So you would check that the group reported to
3 him?

4 A Yes.

5 Q And then would you check to see if his signature is
6 on the report?

7 A Correct.

8 Q And that's the two things that you would do with
9 this report before you would pay out the amount that's on the
10 To Pay column?

11 A That's right.

12 Q And there is nothing else that you would do in going
13 back to check the accuracy of this document?

14 A No. We would only make sure that the Total Payment
15 column matched.

16 Q Okay. Now, Ms. Whaley, you're aware that Vicki
17 Borden is the person who prepares these commission breakdowns.
18 Is that correct?

19 A Yes.

20 Q All right. And are you aware of anyone else in --
21 during the period of 2008 to 2013 that would prepare these --
22 well, strike that. Are you aware of anyone who would check
23 her work, or is that not something that you --

24 A I wouldn't know.

25 Q -- would know? Okay. And Vicki Borden prepared the

1 commission breakdowns for the employees that were in the
2 direct sales department. Is that correct?

3 A Yes.

4 Q And approximately how many people between the period
5 of 2008 and 2013 worked in the direct sales division?

6 A I wouldn't know that off the top of my head.

7 Q Would -- would it -- would it -- would the number 40
8 seem right?

9 A I don't have a basis of comparison right now.

10 Q All right. Can you -- can you give me a more-than
11 number? More than 30? More than 40? More than 50?

12 A Not even that close. I just know the departments
13 change numbers all the time.

14 Q Okay. All right. I want to direct your attention
15 to a reference that the government or a -- one of these
16 commission breakdowns that the government directed your
17 attention to and asked you several questions about. And I am
18 looking at the commission breakdown for -- Government's
19 Exhibit 409, commission breakdown for June of 2012 for Scott
20 Wombold. Do you see that?

21 A Yes.

22 Q Okay. And the government referred you-- Forgive me
23 for my-- All right. The government referred you to this
24 bottom figure here and this notation that was made where
25 the -- on the To Pay line the \$20,489.11 was crossed out and a

1 figure -- a handwritten figure of 30,000 was added to this.

2 Do you see that?

3 A I do.

4 Q And you made the assumption that that was done by
5 Mark Hazelwood --

6 A That's correct.

7 Q -- did you not? And you made that assumption
8 because of what?

9 A His signature under that "30,000."

10 Q So you recognize Mark Hazelwood's signature?

11 A I do.

12 Q Okay. And the government didn't direct you to this,
13 but I will. In the previous -- in the previous commission
14 breakdown, dated May 2012, there's another notation where the
15 To Pay of \$23,142.18 is crossed out. Do you see that?

16 A I do.

17 Q And the amount of 30,000 has been inserted. Do you
18 see that?

19 A Yes.

20 Q And here the -- I'm going to read what I think it
21 says. It says -- it appears to say, "Mark Hazelwood, by VB,
22 per voice mail"?

23 A Yes.

24 Q All right. Now, this is something that you would
25 have seen?

1 A Yes.

2 Q And what would that indicate to you?

3 A That Mark approved it through voice mail, and Vicki
4 wrote it in there as the documentation.

5 Q Okay. And VB would be Vicki Borden?

6 A That's correct.

7 Q And do you recognize her handwriting?

8 A I do.

9 Q Okay. And for approximately how many years did you
10 work when Vicki Borden was there with you?

11 A I think Vicki was there when I came.

12 Q 2002, she was already there?

13 A (Moving head up and down.)

14 Q Until the time --

15 A That's my thinking. I would have to verify it in
16 the system.

17 Q All right. That's fair. All right. Now, with
18 regard to these notations, I want to also show you -- the
19 government didn't show this to you, but I will, on
20 Government's Exhibit 410 that were shown to you by the
21 government -- and they are the commission breakdowns for
22 Heather Jones?

23 A Uh-huh. (Moving head up and down.)

24 Q All right. And I want you -- I would ask you to
25 flip over to the date of October the 8th of -- October of

1 2008, commission breakdown report for Heather Jones. Do you
2 see that?

3 A I do.

4 Q Okay. And on the very bottom there appears to be --
5 on the To Pay line, a pay of 1000 -- I think that's \$969.67.
6 Do you see that?

7 A I do.

8 Q And there appears to be a line drawn through it and
9 another figure --

10 A Yes.

11 Q -- of \$2700?

12 A Yes.

13 Q And that signature you recognize to be whose?

14 A Mark Hazelwood.

15 Q So it appears that Mark Hazelwood added some money
16 to Heather Jones. Is that correct?

17 A Yes.

18 Q And that's a round number, that 2700. Is that
19 correct?

20 A It is.

21 Q All right. Do you know what that's based on? Do
22 you know what Mark Hazelwood based on -- based that on?

23 A I don't.

24 Q Okay. And if you look at the date of August of
25 2009, it appears there that Mark Hazelwood -- or strike

1 that -- that the person who signed this -- you believe to be
2 Mark Hazelwood. Is that correct?

3 A I do.

4 Q -- also added a certain amount here and increased it
5 from \$2317.69 to \$2800.17 -- 17 and 69 cents. Do you see
6 that?

7 A I do.

8 Q Can you do the quick math and tell me how much
9 that's increased by?

10 A Don't make me do math.

11 Q I can do it for you, but I thought I'd make you look
12 good.

13 A I can't see the marked through number. Did you say
14 that's a 5?

15 Q Yeah. It's 2317.69. I think it's \$500.

16 A Five-- 300.

17 Q From -- from 2317 to two thousand --

18 A Oh, to five. Yes, you're right. 500, yes.

19 Q Okay.

20 A I'm still seeing that as a --

21 Q We're in trouble if I'm better at math than you are.

22 A No. I'm still seeing that as a 5, but it...

23 Q All right. But it's a round number. It's either
24 300 or 500. Right?

25 A Yes.

1 Q All right. We can move on. That's --

2 A Okay.

3 Q I think the point is made there, that this change
4 was made and you don't know why this change was made. Is that
5 correct?

6 A That's correct.

7 Q And it appears to be a round number. It's either an
8 increase of \$300 or an increase --

9 A Or 500.

10 Q -- of \$500?

11 A Right.

12 Q And then, if you would -- we determined that the
13 previous month of October 2008 was a round number of 2700. Is
14 that correct?

15 A That is correct.

16 Q Okay. And then I won't do all of them, because
17 there are several, but if we could skip over to June of 2010,
18 on Heather Jones.

19 A Okay.

20 Q Do you see there it appears that it's signed "Mark
21 Hazelwood" and has "VB" underneath, which I think you've
22 indicated previously that would be an indication to you that
23 Vicki Borden did that for Mark Hazelwood?

24 A Yes.

25 Q And you would accept that for payment, right?

1 A Yes.

2 Q And it's an increase of a whole number of \$500?

3 A Yes.

4 Q And once again, you don't know why Mark Hazelwood or
5 Vicki Borden did that?

6 A No. There's no indication.

7 Q And there's also no indication that that's based on
8 any calculation that you're aware of here, right?

9 A That's correct.

10 Q Okay. And then if you flip over to July of 2010
11 there's a -- there appears to be two interlineations of
12 numbers on this July 2010 commission breakdown for Heather
13 Jones. Do you see that?

14 A I do.

15 Q And on the line that corresponds to adjustment for
16 percent of quota, the figure of \$3652.64 has been crossed out
17 and a whole number of 7000 has been inserted. Do you see
18 that?

19 A I do.

20 Q And it appears that if you carry that number down,
21 the To Pay line would change from approximately \$3920.75 to
22 \$7188.11. Do you see that?

23 A I see it.

24 Q Okay. I'm just going to, for the point of -- for
25 the purpose of making this point, show that in September of

1 2010 Mark Hazelwood, by Vicki Borden, also changed that
2 figure. Is that correct?

3 A That is correct.

4 Q And then, lastly, if you will flip over to February
5 of 2012 -- I apologize, as you're looking for it --

6 A Okay.

7 Q -- it appears that that is also changed --

8 A Yes.

9 Q -- to 4800. And then the very last one that I'll
10 show you on here is May of 2012, where there also seems to be
11 a change in the figure and an increase of 5500. Is that
12 correct?

13 A That is correct.

14 Q Now, it's fair to say that in all these examples
15 that I showed you and the government showed you these were
16 increases to the commissions?

17 A Yes.

18 Q Is that your memory? Now, you've reviewed a number
19 of these --

20 A Yes.

21 Q -- for the purpose of paying them. And do you
22 recall-- Well, let me -- let me show you something. I want
23 to show you-- Do you know who -- well, strike that.

24 Are you aware that Mark Hazelwood changed the
25 commission breakdowns for -- well, strike that. Do you recall

1 that Mark Hazelwood changed the commission -- the -- on the
2 commission breakdown forms, that he changed the To Pay amounts
3 for other employees, not just the three individuals that are
4 sitting here?

5 A I would not know that for a fact. I could look back
6 and determine.

7 Q All right. So let me help you with that.

8 A Okay.

9 Q I'm showing you Joint Defense Exhibit 13035, and
10 this a commission breakdown of Wendy Hamilton. Is that good
11 enough for you to see?

12 A Yes, I see it.

13 Q Okay. You see this is a commission breakdown for
14 Wendy Hamilton?

15 A Yes.

16 Q For the date of June 2010. Is that correct?

17 A Yes.

18 Q And I just want to direct your attention to the To
19 Pay line. Do you see that?

20 A I do.

21 Q And is it correct that it appears that \$5000 were
22 added to her commission?

23 A It's 500.

24 Q 500. I'm sorry. \$500, that increased her pay from
25 \$8247 to approximately \$8747. Do you see that?

1 A That's correct.

2 Q And that's also signed "Mark Hazelwood, by Vicki
3 Borden."

4 A Yes.

5 Q Okay. Do you know who Wendy Hamilton is?

6 A I do.

7 Q Do you understand that she is still an employee --

8 A She is.

9 Q -- at Pilot? Okay. And I'm showing you Joint
10 Defense Exhibit 13004. And this is the commission breakdown
11 of Dan Peyton. Do you see that?

12 A I do.

13 Q Okay. And Dan Peyton -- it appears on the To Pay
14 line that his original pay was crossed out from \$12,835 to a
15 round number of \$15,000. Do you see that?

16 A I do.

17 Q Okay. And, again, it appears that it is signed
18 "Mark Hazelwood by Vicki Borden." Do you see that?

19 A Yes, I do.

20 Q Okay. Dan Peyton, you'll recall, was an employee at
21 Pilot?

22 A I don't know. I don't remember him.

23 Q Oh, is that prior to you?

24 A I don't --

25 Q He wasn't there with you in 2002?

1 A I don't know. We have 28,000 employees. I don't
2 remember all of them.

3 Q Well, yeah, but he was a supervisor at the time when
4 he was there, so -- but you don't remember that?

5 A I don't remember him.

6 Q Okay. All right. This is someone you will
7 remember, Karen -- I think you'll remember -- Karen Crutchman?

8 A Yes.

9 Q Okay. And do you see on her commission
10 breakdown—scroll to the bottom here—that her To Pay was also
11 increased fairly significantly on the Adjust for Percentage to
12 Quota, from \$2500 to \$7500. Do you see that?

13 A I do.

14 Q Which increased her Total To Pay from \$3231.70 to
15 \$8231.69?

16 A I see that.

17 Q And that is also a "Mark Hazelwood by Vicki Borden"?

18 A Yes.

19 THE COURTROOM DEPUTY: What number -- what exhibit
20 number is that?

21 MR. RIVERA: I'm sorry. This is Joint Defense
22 Exhibit 13002.

23 BY MR. RIVERA:

24 Q I just have a couple more. Again, another
25 commission breakdown report by -- pertaining to Wendy

1 Hamilton --

2 A Uh-huh.

3 Q -- for the date of August of 2010. And once again,
4 her To Pay is increased from \$4486 to \$9032.21. Do you see
5 that?

6 A I do.

7 Q All right. So my point in showing you this is,
8 would you agree with me -- well, let me -- let me say this:
9 Are you aware that Wendy Hamilton, Karen Crutchman, and Dan
10 Peyton were not charged as defendants in this case? Are you
11 aware of that?

12 MR. HAMILTON: Objection, Your Honor. This is so out
13 of bounds that --

14 THE COURT: We don't -- we don't need any commentary.
15 You made an objection.

16 MR. HAMILTON: Yes, sir.

17 MR. RIVERA: May I respond, Your Honor?

18 THE COURT: Give Mr. Kelly a chance to respond. .
19 Mr. Kelly?

20 MR. RIVERA: Your Honor, the government has shown
21 these commission breakdowns of these three defendants, and has
22 only shown that Mark Hazelwood increased commissions on one of
23 these defendants, Mr. Wombold, giving the impression that
24 Mr. Hazelwood, for some reason—and it appears to be a
25 nefarious reason—only chose to give a commission -- an

1 increase in commission to Mr. Wombold, when in fact he gave
2 these commissions to employees throughout the sales division,
3 and the government -- and the defense has shown that. By -- by
4 showing that he gave these commissions to people who were not
5 charged in this case it undermines the government's inference
6 that he was only giving commissions or increases in commissions
7 to people who were engaged in some type of criminal activity.

8 MR. HAMILTON: May I respond to that, Your Honor?

9 THE COURT: I don't think there is any need to
10 respond. I'm not going to state what may be in the
11 government's mind or what inferences the jury can draw from the
12 evidence. But asking this witness whether somebody else was
13 charged or not, I think it calls for speculation. You probably
14 know this, but grand juries oftentimes indict people and the
15 indictments are sealed. In fact, I think in this district the
16 standard is that every indictment is sealed until the
17 government unseals it for some reason. For all we know, every
18 single person that's mentioned has been indicted. This witness
19 would have no way of knowing that. And if she did know it and
20 she said it in public, she could be put in jail for contempt of
21 court because that information is secret. So that's one --
22 that's one problem with it. She would have no way of knowing
23 whether someone has been charged or not.

24 And the second is, assuming that somebody is guilty
25 of a crime, the government doesn't have to charge everybody

1 that's guilty of a crime. You're not from Chattanooga, but if
2 you venture to travel on our highways you'll see people
3 breaking the law every day on the interstate. And the great
4 majority of those people are not arrested or charged with
5 anything. And that's true of many crimes. The government
6 exercises all kinds of discretion in who to charge and who not
7 to charge. That discretion may be good discretion or may be
8 bad discretion. But I don't know that we can draw inferences
9 from the fact the government's chosen to charge someone and
10 not charge somebody else. It may be they think some people
11 are more handsome than other people, or it may be that they
12 think some people are Alabama fans and not Georgia fans. But
13 they have that right to determine who to charge, as long as
14 it's not on some unconstitutional basis, right?

15 MR. RIVERA: I agree with Your Honor.

16 THE COURT: Yeah. So the fact-- Let's assume that
17 somebody has done something awful and the government has chosen
18 not to charge them. That does not have anything to do with the
19 jury's determination of whether people on trial have committed
20 a crime or not, right?

21 MR. RIVERA: I don't disagree with Your Honor.

22 THE COURT: Very good.

23 THE COURTROOM DEPUTY: What was the number of the
24 last exhibit? I just want to keep up with them, sir,
25 Mr. Rivera.

1 MR. RIVERA: The last exhibit?

2 THE COURTROOM DEPUTY: Yes.

3 MR. RIVERA: It was joint Exhibit 13003. I can
4 withdraw and proceed, Your Honor.

5 THE COURT: Very well.

6 BY MR. RIVERA:

7 Q Did you testify earlier that Wendy Hamilton is still
8 an employee at Pilot?

9 A Yes.

10 Q And it's clear from the documents that I showed you
11 that Mr. Hazelwood, either directly or through Vicki Borden,
12 increased the commissions to people other than the three
13 individuals who are charged here today—Mr. Wombold,
14 Ms. Jones, and Ms. Mann?

15 A Yes, that's what you showed me.

16 Q Okay. Now, Ms. Whaley, you previously, on August
17 the 24th of 2017, signed a document that you attested to under
18 penalty of perjury, entitled "Declaration of Claudine Whaley
19 Concerning Commission Breakdowns." Do you recall that?

20 A I do.

21 Q And your -- in that declaration you referenced
22 certain commission breakdowns. Do you recall that, that
23 you -- in the document itself, you -- I'm about to show it to
24 you --

25 A Okay.

1 Q -- but just for your memory, you indicated that --
2 you referenced within it commission breakdowns?

3 A Yes.

4 Q Okay. And the commission breakdowns that you
5 referenced in this declaration involved the three individuals
6 that are on trial here—Scott Wombold, Karen Mann, and Heather
7 Jones. Is that correct?

8 A Yes.

9 Q Let me show you Joint Defense Exhibit 3- --

10 MR. HAMILTON: Objection, Your Honor.

11 MR. RIVERA: -- 342.

12 THE COURTROOM DEPUTY: Did you say 342?

13 MR. RIVERA: Yes.

14 THE COURT: What's the objection?

15 MR. HAMILTON: The declaration at this point is
16 hearsay. The declaration was a -- it was an authenticity
17 declaration. I don't dispute that it's an authentic document
18 itself, but it's unclear as to what the purpose is. If he's
19 trying to impeach the witness, it's unclear what the
20 inconsistent statement is that he's trying to impeach with.
21 Laying down a document that's an out-of-court statement, this
22 is not proper procedure. So the objection is that the
23 declaration is hearsay at this point.

24 THE COURT: He hasn't offered it into evidence yet,
25 either, as a whole or by asking the witness to adopt anything

1 in it. I think you're correct that it is hearsay, but let's
2 see what the -- what the question is.

3 BY MR. RIVERA:

4 Q Let me -- let me go about this a little bit
5 differently. Were you asked to prepare a -- were you asked to
6 sign a declaration that included references to certain
7 commission breakdowns?

8 A I remember being asked to sign a declaration that I
9 had to attest to some documentation I pulled, yes.

10 Q All right. So without explaining to the jury, I'm
11 going to show you what's been marked Joint Defense Exhibit 342
12 and ask the clerk to hand it to you.

13 THE COURT: You can put it on the display.

14 THE COURTROOM DEPUTY: I turned --

15 THE COURT: Ms. Lewis anticipated you, so she's
16 turned the monitors. So only you and the witness can see it.

17 MR. RIVERA: Thank you, Your Honor.

18 THE COURT: And the lawyers throughout -- the lawyers
19 can also see it. So the jury's in the dark right now.

20 MR. RIVERA: Thank you, Your Honor.

21 BY MR. RIVERA:

22 Q Ms. Whaley, do you see this document?

23 A I do.

24 Q Do you see the title of this document, who it
25 references here? This is called -- in legal terms it's called

1 a style.

2 A Yes.

3 Q And it involves Mark Hazelwood, Scott Wombold. It
4 includes other people, but it also includes Karen Mann and
5 Heather Jones. Do you see that?

6 A I do.

7 Q And it's entitled "Declaration of Claudine Whaley
8 Concerning Commission Breakdowns." All right? Would you take
9 a moment and -- I'll bring that up here so that you can read
10 that to yourself so I can ask you about this document.

11 A (Witness complying.) Okay.

12 Q All right. And I'll flip over to the next page.

13 A Yes.

14 Q That's your signature, right?

15 A It is.

16 Q And you signed it on the 24th of August of 2017. Is
17 that correct?

18 A It is.

19 Q Now, when I asked you earlier --

20 MR. HAMILTON: Your Honor, before the question is
21 asked about it, could she show -- could she see the attachment
22 to that document, to the declaration as well?

23 THE COURT: That's up to Mr. Kelly.

24 Mr. Kelly?

25 MR. HAMILTON: To the declaration itself. There's a

1 third page.

2 MR. RIVERA: Well, Your Honor, the -- the United
3 States doesn't have a third page. It's not interested in
4 moving a third page. I'm only interested in showing her this
5 declaration.

6 THE COURT: You're in control of your examination.
7 So proceed.

8 MR. RIVERA: Thank you.

9 BY MR. RIVERA:

10 Q Ms. Whaley, I asked you earlier whether you had
11 referenced certain commission breakdowns in this document.
12 All right? And what I was referring to was, if you would look
13 to the Paragraph 2 here where it indicates -- if you'll read
14 it to yourself --

15 A Uh-huh.

16 Q -- to try to keep from reading it out loud here.

17 A Uh-huh.

18 Q But it does indicate certain breakdowns of these
19 three individuals.

20 A Right.

21 Q And then it references these Bates stamp -- what
22 they call Bates stamp numbers, Bates-labeled numbers. All
23 right? Do you see that?

24 A I do.

25 Q PFJ beginning with 2019 and ending with 282?

1 A Yes.

2 Q And the next one is referenced 320 to 384?

3 A Yes.

4 Q And there's a final one there as well. Do you see
5 that?

6 A I do.

7 Q And these pertain to commission breakdowns, as you
8 state in this document, to Heather Jones, Karen Mann, and
9 Scott Wombold. Is that correct?

10 A That's correct.

11 Q So that refreshes your recollection --

12 A It does, yes.

13 Q -- that you executed this document, and -- including
14 these documents?

15 A Yes.

16 Q Now, I want to show you...

17 Your Honor, these are extensive. Would it be easier
18 to summarily hand these to the witness and have her review the
19 Bates stamps so she can attest that they are --

20 THE COURT: Give them to Ms. Lewis.

21 (Brief pause.)

22 THE WITNESS: Thank you.

23 BY MR. RIVERA:

24 Q If you look on the bottom lower right-hand side, you
25 see that there is a -- a number?

1 A Yes.

2 Q And would you check and see that those numbers are a
3 subsection of these numbers here? (Indicating.) I think
4 probably the best way to do that is, if you first look at
5 Heather Jones, it would correspond to the 219 to 282. Do you
6 see that?

7 A I do.

8 Q And the next group would correspond to Karen Mann,
9 which would be the 320 to 384?

10 A Yes.

11 Q And then the last one is Scott Wombold?

12 A Yes.

13 Q Okay. And then in just looking at these documents,
14 do you recall that these documents are an earlier version -- a
15 unfinished or unfinalized version of the documents that were
16 just introduced into evidence?

17 A Yes. They don't have the signatures.

18 Q Okay. And they also don't have the handwritten
19 additions on the -- on the -- that were made, presumably, by
20 Mark Hazelwood?

21 A Yes. I don't see those.

22 Q All right. So -- so in this document, you indicated
23 that these -- the documents that are in your hand were the
24 documents that were used by the payroll department as the
25 basis for payment of commission to those employees?

1 A Those would be the commission breakdowns, yes.

2 Q Right. But you would agree with me that in fact
3 those are not the commission breakdowns that were used,
4 because they're not finalized, right? They don't have --

5 A Without the signature, yes.

6 Q Right. They don't have the signature. And they
7 also don't have the increases that were made to Scott Wombold,
8 and they don't have the increases that were made to Heather
9 Jones. Is that correct?

10 A I don't see those. You're right.

11 Q Right. So -- so in fact, the -- these were not the
12 commission breakdowns that were used by Payroll to pay these
13 individuals, but the ones that the government introduced, that
14 were finalized with the signatures, are the ones --

15 A Uh-huh.

16 Q -- that were used to pay these individuals. Is that
17 correct?

18 A That is correct.

19 Q All right. So is it fair to say that --

20 MR. RIVERA: Well, Your Honor, at this time I would
21 like to move this document into evidence and publish it to the
22 jury.

23 THE COURT: Any objection?

24 MR. HAMILTON: No, Your Honor.

25 THE COURT: Okay. It's admitted. And it may be

1 published.

2 MR. RIVERA: Thank you.

3 THE COURTROOM DEPUTY: And this is?

4 MR. RIVERA: This is Joint Defense Exhibit 342.

5 MR. HAMILTON: Objection, Your Honor. Actually
6 this -- the case heading on this is not appropriate for -- it
7 has a -- it identifies people who are not on trial in this
8 particular case, because it has a case caption --

9 THE COURT: It's just the first page-- I think
10 you're pointing out some discrepancies between her present
11 testimony and the document and this earlier version. I think
12 that's what's important. Is there anything in the first page
13 that would cover that?

14 MR. RIVERA: Your Honor, if I could respond.
15 There -- although that's the case, there is no prejudice here,
16 in that the persons that are referenced are individuals who --
17 who --

18 MR. HAMILTON: Well, Your Honor, before he goes on...

19 THE COURT: The question, is there anything on the
20 first page that really points out the discrepancy?

21 MR. RIVERA: There is, Your Honor. The -- not just
22 the -- not just the Bates-stamped numbers, but beginning
23 paragraphs, including the fact --

24 THE COURT: The jury -- the jury will have no idea
25 what "Bates stamp numbers" means. That's all Greek to them.

1 MR. RIVERA: Your Honor, if I may, I can redact the
2 portions that the government is objecting to, the names on the
3 style.

4 THE COURT: That's fine. I was just going to suggest
5 putting everything except the first page. But if you think you
6 can redact the first page, that's fine. So what counsel will
7 do, then, is to redact the one part of the document as to which
8 there is an objection. Otherwise, it's admitted, and it may be
9 published.

10 So if you want to publish it now, why don't you just
11 go ahead and do the second page through the end of it. I
12 don't think you wanted to ask the witness anything on the
13 first page, did you, other than the Bates number? And as I
14 said, I don't think the term Bates number means anything to
15 nonlawyers. When they hear "Bates," they probably think of
16 that horror movie. What was it? Motel? Hotel?

17 MR. RIVERA: Your Honor, I also have a low-tech way
18 of doing this as well. I can fold over the page.

19 THE COURT: Excellent.

20 MR. RIVERA: Great. Thank you.

21 THE COURTROOM DEPUTY: So we're publishing it?

22 MR. RIVERA: Yeah. This is Joint Defense
23 Exhibit 342. After years of trial experience.

24 BY MR. RIVERA:

25 Q All right. Ms. Whaley, I'm showing you a portion of

1 this -- of your declaration.

2 A Yes.

3 Q All right. And I will come back to this -- to this
4 first page here, but as I was referring earlier, you indicated
5 these Bates stamp numbers -- here are the -- you reference
6 your position, you also reference that these commission
7 breakdowns referenced in this declaration is the Bates stamp
8 numbers that we talked about earlier, right? Just doing that
9 for the benefit of the jury. And then you state here that the
10 commission breakdowns were prepared to identify commissions
11 payable to employees on direct sales team. And then you
12 further state that during the time period --

13 Your Honor, I -- I misspoke earlier. There is a
14 third page, and I have no objection to that coming in as well.
15 I'll even display it to the -- to the witness. And it is a
16 third page, and it's the commission breakdown of Heather
17 Jones.

18 THE COURTROOM DEPUTY: Are you publishing it?

19 MR. RIVERA: Yes, I am publishing it. Thank you.

20 BY MR. RIVERA:

21 Q And it's a commission breakdown of Heather Jones
22 that I believe was used as an example in the -- in the
23 declaration itself. All right?

24 So turning now to the second page of your
25 declaration, it begins from the first page, it says, "During

1 the time period" -- it goes on to say, "covered by the
2 above-referenced commission breakdowns, the payroll department
3 used the commission breakdowns as the basis for the payment of
4 commissions to those employees."

5 Now, when it says "covered by the above-referenced
6 commission breakdowns," it's referring to the ones that we
7 looked at, that you're looking at there, that are blank?

8 A Uh-huh.

9 Q Is that correct?

10 A Yes.

11 Q Okay. But, in fact, those weren't the ones that
12 were used, as you just indicated. It was the finalized
13 versions that were used by the government?

14 A Well, at the time this was being prepared --

15 Q Uh-huh.

16 A -- this is what I had.

17 Q Right. So we're going to get to that, but I am
18 right, that now, looking at it now --

19 A Uh-huh.

20 Q -- you realize that it wasn't these that were used,
21 it's the final ones of the government's that were used?

22 A It was only with signatures, yes.

23 Q Okay. So this is not correct. Is that right?

24 A I'm not sure exactly how to answer that, because
25 it's correct that this is the type of commission breakdowns we

1 used, and it's correct that this is an example of exactly what
2 those are.

3 Q Right.

4 A But it is also correct that they don't have the
5 signature on them, so they were not the final documents.

6 Q But it's incorrect because it says, right, that the
7 ones that are referenced here for these individuals, "The
8 commission breakdowns were prepared to identify commissions
9 payable to the employees of the direct sales group during the
10 time period -- during the time period covered by the
11 above-referenced commission breakdowns," which are the ones
12 that you have there. The payroll department used the
13 commission breakdowns as the basis for the payment of
14 commission to those employees, right?

15 A Yes. And during that time period we did use the
16 commission breakdowns.

17 Q Right. You used the commission breakdowns but not
18 those commission breakdowns. Is that right?

19 A Used the commission breakdowns. Some of these
20 didn't change. Some might have had that adjustment. But none
21 of them had the signature.

22 Q Okay. So the commission -- the ones that were
23 adjusted or changed were not the ones that were used. Is that
24 correct?

25 A The changes, yes, that's right.

1 Q Okay. Now I'll ask you—and you started to
2 volunteer this information earlier—where did you get these
3 commission breakdowns, these blank ones?

4 A Those were -- I think those were in a binder shown
5 to me.

6 Q By?

7 A I think it was by the government.

8 Q Okay.

9 A Not by the government necessarily, but by our
10 attorneys.

11 Q Okay. Would -- do you have information to know that
12 it was by your attorneys at the request of the government?

13 A I don't know that.

14 Q All right. What about this declaration? Did you
15 type this declaration yourself?

16 A I did not.

17 Q Who prepared this declaration?

18 A It was -- it was, I think, by our attorneys, by
19 someone there, because it was sent to me to sign.

20 Q Okay. And do you --

21 A And these were as examples of the commission
22 breakdowns.

23 Q All right. Did you know at the time that this was
24 going to be used in a courtroom?

25 A If I sign a declaration, I could assume it would be,

1 yes.

2 Q Okay. And you -- but you reviewed these, didn't
3 you?

4 A I looked at these to see that they're the type of
5 commission breakdown sheets we used, yes.

6 Q All right. And they weren't signed, were they?

7 A They were not.

8 Q And you learned later on that some of them had
9 changed?

10 A Yes. When I reviewed them to pull the signed
11 documents, yes.

12 Q Okay. Now, you testified that-- The ones that the
13 government has put in evidence now, are those the ones that
14 were used to pay the commissions?

15 A The ones with the signatures. (Moving head up and
16 down.)

17 Q All right. The ones that were also adjusted or
18 additional amounts were added?

19 A On some of them, yes.

20 Q Okay. Are you sure there isn't yet another version
21 that may have been used?

22 A Not for payroll, because when we pay it, we scan it
23 into the document management. And I pulled those out of the
24 document management system. I compared them to the payroll
25 system, as far as what payments were made.

1 Q Okay. All right. So you're saying that you checked
2 the second version that you just got?

3 A Yes.

4 Q All right. The handwritten notations that we've --
5 that I've shown you and you've discussed, those handwritten
6 notations, you testified you don't know what they're based on?

7 A I don't.

8 Q Okay. You don't know -- you don't know whether
9 they're based on -- you don't know -- strike that. You don't
10 know whether Mark Hazelwood thought, "This is a good month.
11 Let me give everybody an increase"? You don't know if that
12 was the case?

13 A I don't know that.

14 Q All right. But you can't testify that those numbers
15 are based on any profit calculation by Pilot, right?

16 A Correct.

17 Q Now, you testified that these documents, these
18 commission breakdowns, were prepared -- you testified that
19 these commission breakdowns were prepared by Vicki Borden, and
20 that neither you nor anyone in your department went back to
21 determine the accuracy of her calculations or the input of her
22 information. Is that fair?

23 A That is correct.

24 Q So putting back on the screen Government's
25 Exhibit 410, you did not go back to check to see if when Vicki

1 Borden wrote in for Brian's direct bill on the February 2008
2 commission breakdown 336,665.09, whether that's really Brian's
3 direct bill, right? You didn't go back and check that?

4 A No, no.

5 Q So if she, for example—and I'm just picking
6 something here—this 6 that I'm pointing to here, if that was
7 originally a five and she made it a six, you wouldn't know
8 that?

9 A I would not know that.

10 Q Okay. And you would agree with me that any changes
11 that Vicki Borden would make—this is sort of a math
12 question—to some of these figures here would have an effect
13 on the total commission and ultimately the Total To Pay?

14 A Yes.

15 Q Okay. All right. So let's talk about the person
16 who prepared these documents that you testified about. You
17 rely on the accuracy of this To Pay number in order to pay the
18 employee their commission?

19 A Yes.

20 Q Right. And if -- if this is wrong, then the
21 employee would be paid incorrectly. Is that right?

22 A That is correct.

23 Q So there's a lot weighing on this being correct?

24 A Yes.

25 Q And you've put -- you and your department put

1 reliance on that. Is that correct?

2 A Exactly.

3 Q Okay. Are you aware that the person who prepared
4 these commission breakdowns, Vicki Borden, is now a convicted
5 felon?

6 MR. HAMILTON: Objection, Your Honor.

7 THE COURT: Is that impeachment, Counsel?

8 MR. RIVERA: Yes, it is.

9 THE COURT: Do the rules allow impeachment of someone
10 who has not testified as a witness?

11 MR. RIVERA: Well, Your Honor, let me -- let me
12 rephrase that. What the -- what the defense is doing with
13 respect to this line of questioning is showing that -- and I
14 think may -- the following questions will illustrate that the
15 person who prepared this document was preparing them under
16 circumstances that make these documents unreliable.

17 THE COURT: And they're unreliable because the person
18 is a felon?

19 MR. RIVERA: Your Honor, I can -- I can move on from
20 that particular question.

21 THE COURT: Isn't that impeachment, though? Isn't
22 that the definition of impeachment? You're calling into
23 question someone's credibility, that is, whether you can rely
24 upon what they say in court because they are a felon?

25 MR. RIVERA: I think it is.

1 THE COURT: Okay. And the rules do not permit
2 impeachment of witnesses who have not testified, do they?

3 MR. RIVERA: Well, Your Honor, I'm not impeaching --
4 I'm not impeaching that witness.

5 THE COURT: Nonwitness.

6 MR. RIVERA: That-- I'm sorry. I'm not impeaching
7 that nonwitness. What I am doing is showing the unreliability
8 of the document based on --

9 THE COURT: What does impeachment mean? When you
10 impeach a person, what does that mean?

11 MR. RIVERA: You undermine their credibility. And
12 I'm undermining the credibility of that witness, but for a
13 different reason, for that individual, that nonwitness, to show
14 --

15 THE COURT: Why does the reason make a difference, as
16 long as what you're doing is impeaching?

17 MR. RIVERA: Because --

18 THE COURT: I don't know that the rules make any
19 distinction. If you impeach someone, it's impeachment, and I
20 don't know that it makes any difference, the reason, does it?

21 MR. RIVERA: Well, let me withdraw that particular
22 question --

23 THE COURT: Very well.

24 MR. RIVERA: -- and see if I draw fire on the
25 following questions.

1 BY MR. RIVERA:

2 Q You're aware that Vicki Borden was preparing these
3 documents -- or you reviewed -- strike that. You reviewed
4 documents that Vicki Borden prepared, commission breakdown
5 reports, some between the years of 2008 and 2012?

6 A Yes.

7 Q Okay. And during that period of time are you aware
8 that Vicki Borden was engaged in fraudulent activity that may
9 have been related to these commission breakdowns?

10 A I'm not aware personally of anything about that.

11 Q Okay. If you learned-- I'm speaking about the
12 reliability and the reliance that you placed on these
13 documents.

14 A Yes.

15 Q If you learned that Vicki Borden was engaged in
16 fraudulent activity at the same period of time that she was
17 protect -- preparing these documents --

18 A Yes.

19 Q -- would that make these documents and your reliance
20 on them -- would they make them less reliable?

21 MR. HAMILTON: Objection, Your Honor.

22 THE COURT: Sustained.

23 (Brief pause.)

24 BY MR. RIVERA:

25 Q Is Vicki Borden an employee of Pilot right now?

1 A She is not.

2 Q Do you understand that Vicki Borden has been fired
3 from Pilot?

4 A Yes.

5 Q And do you understand that she was fired for
6 committing fraud while in employment -- an employee at Pilot?

7 MR. HAMILTON: Objection, Your Honor.

8 THE COURT: Sustained.

9 BY MR. RIVERA:

10 Q Are you aware of -- are you aware that Vicki Borden
11 prepared these documents, these commission breakdowns, on
12 behalf of or for colleagues who worked for -- with her?

13 A What I am aware of is that Vicki put these
14 spreadsheets together and got them approved by Mark and then
15 sent them to us to pay.

16 Q All right. She prepared these commission breakdowns
17 for individuals that were, I think you testified earlier, in
18 the sales -- direct sales department. Is that correct?

19 A Yes.

20 Q And she was also in the direct sales division?

21 A She was.

22 Q And so there were other people in this direct sales
23 division that she worked with that she prepared these
24 documents --

25 A Yes.

1 Q -- for? And are you aware that she also prepared
2 the commission breakdown for her own supervisor?

3 A For-- I don't know who her-- I thought Mark was
4 her supervisor.

5 Q Okay. He wasn't, but -- but you're not aware of
6 that?

7 A Right. I'm not.

8 Q Are you aware whether she prepared her own
9 commission breakdown?

10 A She did not.

11 Q Okay. And are you aware that she prepared
12 commission breakdowns for individuals that she's known for
13 many years?

14 A Yes.

15 Q Okay. And you would agree that if she entered --
16 that if she favored any of these individuals, that she can
17 manipulate the numbers on these commission breakdowns to
18 increase their commissions?

19 A That would be a reasonable assumption.

20 Q Okay. Now, Ms. Whaley, if you learned that Vicki
21 Borden admitted that she made up some of the figures on these
22 commission breakdowns, would that make them less reliable?

23 A If I had learned it during that time? Is that what
24 you're asking?

25 Q No. If you learned it now.

1 A Well, they were still approved. So as long as that
2 approval is on there, I'm relying on them.

3 Q I understand that. But would you be relying on them
4 incorrectly? Would they be unreliable if she falsified
5 information on these documents?

6 A Are you asking me if in hindsight --

7 Q Sure.

8 A -- I would say they're unreliable?

9 Q Sure.

10 A I couldn't judge that.

11 MR. HAMILTON: I'm going to object, Your Honor. May
12 I state why?

13 THE COURT: There is no need. It assumes a fact not
14 in evidence. That's a violation of Rule 611. You were
15 assuming that something has happened, and there's been no
16 evidence at all presented to the jury that that event has
17 happened. And that would be asking the witness to assume that
18 that's the case and what would be the result. So it calls for
19 speculation on the part of the witness, and therefore the
20 objection is sustained.

21 BY MR. RIVERA:

22 Q All right. Ms. Whaley, I want to show you certain
23 documents.

24 THE COURTROOM DEPUTY: Do you want them just to show
25 her?

1 MR. RIVERA: No. I'm going to publish these and
2 admit them.

3 BY MR. RIVERA:

4 Q Joint Defense Exhibit 322. Ms. Whaley, I want to
5 show you these exhibits and ask you if you have seen these and
6 if these documents would make the commission breakdowns report
7 less reliable. These were prepared -- these e-mails are in
8 relation to the preparation of the commission breakdowns, and
9 you'll see that here. And on the bottom there, if you can
10 see, there is an e-mail from John Freeman, starting at the
11 bottom --

12 A Uh-huh.

13 Q -- on May the 24th of 2011, to Vicki Borden, and it
14 reads, "Part of me wants to ask to increase his manual rebate
15 and points section to decrease his commission by about a
16 thousand dollars."

17 A Uh-huh.

18 Q And if you look below that, it begins on May
19 the 24th of 2011, by Vicki Borden, with the relationship --
20 with relation to Tim Hampton's commission calculation. Do
21 you --

22 A I can't see that part.

23 Q -- see that? Oh, I'm sorry. You're absolutely
24 right. I apologize. Thank you for correcting me.

25 A Okay. Okay. I see that.

1 Q All right. So it's relating to Tim Hampton's
2 commission calculations. You see that?

3 A Yes.

4 Q And John Freeman says, "Part of me wants to ask you
5 to increase his manual rebate and points section to
6 increase -- to decrease his commission by a thousand." Right?
7 See that?

8 A Yes, I do.

9 Q And then Vicki Borden responds to John Freeman, "He
10 watches the numbers, but let me know if you want me to
11 adjust."

12 A I see that.

13 Q Okay. So would you agree that Vicki Borden here
14 appears to be willing to manipulate a salesperson's commission
15 at the request of John Freeman? Do you see that?

16 A I see --

17 MR. HAMILTON: Objection.

18 THE COURT: What's the objection?

19 MR. HAMILTON: It's speculation, and it's also
20 hearsay, but we're beyond that.

21 THE COURT: Okay. The question was whether she saw
22 something, and I think the witness answered that she's seen it.
23 So she's already answered the question.

24 A I see the e-mail, but I don't understand --

25 THE COURT: Ma'am, ma'am, you've already answered.

1 You don't need to go any further.

2 THE WITNESS: Okay. Okay.

3 BY MR. RIVERA:

4 Q Do you agree that this e-mail from John Freeman
5 relates to the commissions of Tim Hampton?

6 A That is the subject, yes.

7 Q Okay. Do you agree that John Freeman is requesting
8 to decrease the commission of Tim Hampton by a thousand
9 dollars?

10 A That is what the e-mail says.

11 Q And do you agree that Vicki Borden indicates that
12 "He watches, but let me know if you want me to adjust"? Do
13 you see that?

14 A Yes, I see that.

15 Q All right. I want to show you Joint Defense
16 Exhibit 323. I'm going to scan this back, Ms. Whaley. You
17 tell me if this becomes too small for you to see. I'll try to
18 capture as much as I can on this.

19 MR. HAMILTON: Your Honor, objection to these
20 documents as hearsay. I know I can't make an objection until I
21 actually hear a question, but he's just laying documents down
22 on the camera that are hearsay, and the United States makes an
23 objection to this document and to any other emails that he's
24 about to lay down that are hearsay.

25 THE COURT: Well, let's make sure the jury cannot see

1 them. So there is something that counsel has put on the
2 evidence presenter, and the government makes an objection to
3 it. So let's see what the question is with respect to the
4 document, and if there's still an objection, the Court will
5 take up the objection then.

6 MR. RIVERA: Your Honor, may I have one moment,
7 please?

8 THE COURT: You may.

9 (Off-the-record discussion between defense counsel.)

10 MR. RIVERA: So, Your Honor, let me -- point of
11 clarification with respect to whether this is hearsay or not.
12 The defense is not offering these documents for the truth of
13 the matter asserted.

14 THE COURT: Are you offering the documents at all? I
15 mean, I don't know where you're going. Do you plan-- You can
16 do many things with documents, and among those things is offer
17 them into evidence. So are you planning to offer them into
18 evidence?

19 MR. RIVERA: Firstly, I am planning on offering them
20 into evidence, not for the truth of the matter asserted, but to
21 show that it was said. The --

22 THE COURT: Well, let's take this. Are you willing,
23 then, to instruct the jury that they should disbelieve
24 everything in the document, they should assume everything in
25 the document to be not true?

1 MR. RIVERA: Well, not to disbelieve, Your Honor, but
2 that they're not being offered for the truth.

3 THE COURT: Well, if you will stipulate that the jury
4 should consider everything in the document to be untrue, then I
5 think we can go ahead and let you use them. If, though, there
6 is a possibility the jury might assume that anything in the
7 documents are true, I think we do have a hearsay problem.

8 MR. RIVERA: Your Honor, I'd be willing to stipulate
9 to that.

10 THE COURT: Very well. Do we have a number for this
11 exhibit?

12 MR. RIVERA: Yes, we do, Your Honor. And that -- I
13 have several exhibits that I intend to show under this same
14 condition.

15 THE COURT: All right.

16 MR. HAMILTON: So the United States --

17 THE COURT: You look confused, Mr. Hamilton.

18 MR. HAMILTON: Well, I would have to say that, based
19 on what I'm seeing, then, the United States -- if nothing in
20 these e-mails -- if they're not being offered because any of it
21 is true and in fact he's stipulating that it's all false, or
22 not true, then it is not relevant.

23 THE COURT: Well, we don't know what he's going to do
24 with them. But once we get the documents identified, I'll tell
25 the jury that "You are being presented with certain documents.

1 You've heard counsel say that they're not being offered for the
2 truthfulness of the matter asserted. So you can never, ever
3 under any circumstances assume that anything at all in the
4 documents is true. In fact, you must assume the exact
5 opposite, that every line, every word, every letter in the
6 document is false." Okay?

7 MR. RIVERA: And, Your Honor, in terms of
8 relevance -- and I know we haven't reached that, but in terms
9 of relevance, this witness --

10 THE COURT: Well, there has not been an objection to
11 relevance. And once you concede that everything in the exhibit
12 is false, I'm not sure what we do with the relevance. I think
13 we only attach relevance if there is some assumption something
14 in it is true.

15 MR. RIVERA: Very well.

16 THE COURTROOM DEPUTY: So it's 323?

17 MR. RIVERA: 323.

18 THE COURT: 323. So it's Joint Exhibit 323, ladies
19 and gentlemen. Everything in this document, you should assume,
20 is false.

21 MR. RIVERA: And, Your Honor, I led with 322.

22 THE COURT: I'm sorry, 322.

23 MR. RIVERA: And should I just list --

24 THE COURT: That's also the case for the witness.
25 The witness should also assume that everything you're being

1 presented with now is false.

2 THE WITNESS: Okay.

3 MR. RIVERA: Your Honor, and I can list the exhibits
4 that I intend to show, so that...

5 THE COURT: Very well.

6 MR. RIVERA: It will be 322, 323, 324, 338, 326, 327,
7 329, 330, 331, 332, 333, 335, 336, 337, 339, 340, 341, and 325.

8 BY MR. RIVERA:

9 Q Now, Ms. Whaley, I'm showing you Joint Defense
10 Exhibit 323.

11 A Okay.

12 Q Begin reading from the beginning. It's from Arnie
13 Ralenkotter to Vicki Borden, and here Arnie Ralenkotter is
14 asking for "Summary commission statements for August for the
15 individuals on my team." Do you see that?

16 THE COURT: Well, I think we should assume that
17 Mr. Ralenkotter actually doesn't say that. That is what the
18 document says, but I think that since we're stipulating that
19 the jury cannot assume anything is true, that we should not
20 assume that Mr. Ralenkotter actually said that or that that was
21 actually his -- an email from him.

22 MR. RIVERA: All right. With that instruction --

23 BY MR. RIVERA:

24 Q And the response from Vicki Borden to Arnie
25 Ralenkotter is, "I will look up -- look those up. The numbers

1 are all incorrect on the details. I just changed the bottom
2 number to be their cap." Do you see that?

3 A I see those words.

4 Q Okay. That's all it is, it's words, right?

5 A Uh-huh.

6 Q All right. And then, on the bottom, continuing on,
7 from Arnie Ralenkotter, back to Vicki Borden, "I just want to
8 track their total commissions for the month. If you can just
9 send me what we paid out, that would be enough."

10 And from Vicki Borden to Arnie Ralenkotter, "Sure,
11 sorry about that. They are so made up right now, it's almost
12 scary."

13 Do you see -- do you see that from Vicki Borden?

14 A I see those words on the paper.

15 Q All right. When you say "I see those words," what
16 do you mean?

17 A We're assuming it's not from Vicki Borden, right?

18 (Laughter.)

19 THE WITNESS: This-- I'm just-- This has nothing to
20 do with what I do.

21 THE COURT: You're absolutely correct, ma'am. That's
22 the assumption that you must make.

23 MR. RIVERA: This is not your fault, Ms. Whaley.

24 THE WITNESS: It's not anything in my job, to look at
25 this. So I just -- I'm trying to be cooperative.

1 BY MR. RIVERA:

2 Q All right. You see these words?

3 A I see those words.

4 Q From Vicki Borden, "Sure, sorry about that. They
5 are so made up right now, it's almost scary."

6 The response from Arnie Ralenkotter. "It's ok." Do
7 you see that?

8 A I see those words.

9 Q Okay. I'm showing you Joint Defense Exhibit 324.

10 THE COURT: And the same rule operates for this
11 document.

12 BY MR. RIVERA:

13 Q And this document, an e-mail from Heather Jones,
14 Question about Rest., R-E-S-T, P&L. And I won't read the
15 entirety. It starts with, "I hope you feel better." The
16 first sentence says, "I noticed that Brian's commission as
17 seen on his Rest. P&L is quite a bit lower than what is showed
18 for January due to the rate change. Cathy's stayed the same.
19 I just wanted to make sure that is correct. I assume it's due
20 to changes you had to make to the calculation. Let me know if
21 you want me to bring them in there for you to look at."

22 And the response from Vicki Borden that states, "I
23 think Lori had input Brian's wrong last month, and I adjust on
24 his commission sheet. I will look at all of them before we
25 pay commissions. I have a hidden percentage in the file that

1 I will need to proof their sheets against."

2 Let me ask you a question. Are you aware --
3 separate and apart from this particular e-mail, are you aware
4 if in the calculations of commission breakdowns a hidden
5 percentage should be used?

6 A I'm not aware of what is used.

7 Q Okay. When you do payroll, do you have hidden
8 percentages that you use?

9 A No, I do not.

10 MR. COOPER: If Your Honor please, I'm sorry, I know
11 it's close to 12:00. And Ms. Mann has done the best she can,
12 but she's floating.

13 THE COURT: Lunch break? Very well. It is slightly
14 after noon. Why don't we take our lunch break now. We will
15 return at 1:30. Remember my earlier admonitions regarding
16 looking at anything or reading anything or discussing anything
17 at all about this trial.

18 Ms. Lewis.

19 (Luncheon recess.)

20 THE COURT: You may resume.

21 MR. RIVERA: Thank you, Your Honor.

22 CROSS-EXAMINATION (Continuing)

23 BY MR. RIVERA:

24 Q Good afternoon, Ms. Whaley.

25 A Good afternoon.

1 Q Ms. Whaley, we left off with Joint Defense
2 Exhibit 338, I'm showing you here. And this document is --
3 purports to be an e-mail from Vicki Borden to Heather Jones
4 and others. And for expediency, I won't always read the
5 entire e-mail --

6 A Okay.

7 Q -- but you feel free to.

8 "Okay. Here it is. The P&L's are correct but
9 incorrect. There was a huge entry made to the general ledger
10 for October that makes the cost-plus profits negative. This
11 entry really offsets some incorrect numbers accumulated from
12 prior months. Since it is impossible to know how much of the
13 incorrect numbers everyone was paid too much on in the prior
14 months, to offset the underpayment this month, Mark and I are
15 going to get together after everything is calculated and
16 adjust to what we think is fair. So go ahead with the P&L's,
17 but we definitely won't want to use these for much analysis on
18 profits because a lot of the cost plus will be incorrect."

19 Do you see that?

20 A I do.

21 Q Okay.

22 MR. HAMILTON: I'm sorry. I missed that exhibit
23 number. What was that?

24 MR. RIVERA: Which is JDX 338.

25 MR. HAMILTON: 338?

1 BY MR. RIVERA:

2 Q I'm showing you Joint Defense Exhibit 326. And I'm
3 reading from the bottom that purports to be -- begin from John
4 Spiewak to Vicki Borden. It says, "Vicki, my mortgage
5 biweekly pay program pulled twice the proper amount that they
6 were supposed to twice in a row. They admitted the mistake;
7 however, they cannot guarantee that the funds will hit my
8 account, reverse the funds, for two weeks. With the
9 15th coming, it's going to be tight. Is there any way I can
10 get \$2500 net this pay period and deduct it from my next
11 commission? I hate to ask, but my mortgage company has not
12 been helpful."

13 It appears that Vicki Borden responds on April
14 the 8th, 2013, "I don't know your withholding, so can you give
15 me an idea of what gross number I need to submit to get around
16 the 2500 net?"

17 And the response from John Spiewak is, "3500 should
18 be plenty."

19 A I can't see that part.

20 Q Oh, I'm sorry.

21 A Yes, I see that.

22 Q Looking at Joint Defense Exhibit 33- -- 327, it
23 begins on the bottom, purports to be from Heather Jones, on
24 October 15th, 2010, to Vicki Borden, states, "What is the
25 deadline we need to use for having our rebates done? Are you

1 using them for commissions this month? Just checking. Brian
2 wants to use the P&L's and make his adjustments, and we are
3 going -- and we are just trying to coordinate."

4 It appears that Vicki Borden responds on October
5 the 15th, 2010, to Heather Jones, "I meet with Mark at 3:30,
6 and my first question is, what do we do about commissions this
7 month? I really won't have an answer until then. If we use
8 real numbers, we will need to have them printed and turned in
9 by Wednesday."

10 Do you see that e-mail?

11 A I see that.

12 Q Okay. Turning to Joint Defense Exhibit 329, this
13 purports to be an e-mail from Vicki Borden, sent on Tuesday,
14 June the 2nd, 2009, to Steve Ryding. It says, "On U.S. Food
15 hedges, does this sound fair to you? My list shows our total
16 profit on hedges, not including the contract done today, of
17 \$1,000,231- -- 231,816. The 'at time of contract' commission
18 on those for you would be \$12,318.16. I don't want to throw
19 up a flag with this type of payment. Are you okay with me
20 adding 3000 to your commission for the next four months in
21 addition to paying you for any more contracts as they are put
22 on?"

23 And it continues to read further, with the response
24 from Steve Ryding to Vicki Borden states, "You have always
25 treated me more than fair. That just proves again that you're

1 treating me more than fair again. Thanks for everything. I'm
2 trying hard not to sound like a suck-up."

3 See that?

4 A Yes, sir.

5 Q Okay. Now, turning to Joint Defense Exhibit 330.
6 Starts from the bottom. Sent to -- sent from Janet Welch to
7 Vicki Borden. "Kevin is supposed to complete his this
8 morning. We will get it to you as soon as possible" -- I'm
9 sorry, it starts out with Vicki Borden writing to Ryding, "I
10 need the spreadsheet from the inside group. Trying to finish
11 up the commission this morning," to which Ms. Welch responds,
12 "Kevin is supposed to complete his this morning. We will get
13 it to you as soon as possible."

14 And then Vicki Borden appears to respond, "Kevin has
15 no accounts left to calculate from. I assumed we would just
16 make up his commission." See that?

17 A I do.

18 Q And then—I'm almost done here—Joint Defense
19 Exhibit 331. This is -- purports to be an e-mail to the
20 direct sales field from Vicki Borden, regarding commissions.
21 The subject is commissions. And I'm reading, "Mark and I had
22 a discussion about commissions to be paid this month. The
23 P&Ls are iffy as to whether they are correct. The restricted
24 bases are not correct. Many other factors are not proofed.
25 So for this month Mark will pay you your capped amount if you

1 have one or your highest month received for this year as your
2 commission if you do not have a cap. He knows everyone has
3 been working extremely hard and thinks this is fair. I think
4 this is fair also and will also enable us to pay commissions
5 on time." You see that?

6 A I do.

7 Q Looking at Joint Defense Exhibit 332, it begins at
8 the bottom with Vicki Borden referencing commissions
9 percentage, and it just reads briefly, "As Mark discussed
10 briefly during our sales meeting call, due to a new
11 transaction fee schedule and a reduction in interest charged
12 for direct bill receivables, the commission percentages have
13 been adjusted slightly to keep our commissions at a neutral
14 amount." Skip that last sentence.

15 Heather Jones responds, "Speaking of pay, do you
16 have me down for a review? Just wondering."

17 And Vicki Borden responds, "Yes, I have actually
18 worked on it a little, then I got sidetracked trying to change
19 all these commissions correctly. It worries me when I have to
20 adjust these that I might do something wrong." You see that?

21 A I do.

22 Q Turning to Joint Defense Exhibit 333, and it begins
23 with Vicki Borden, at the very bottom, to Brian Mosher, "Mark
24 wanted me to calculate the percent of commissions so that the
25 percent of the national and regionals were the same. For you,

1 instead of a .0090 and .0040, the calculation comes to .0065
2 for both. You will see that .0065 on your commission this
3 month."

4 And Brian Mosher responds to Vicki Borden -- or to
5 Vicki Borden, "Shouldn't that number be higher since regionals
6 are or have been more of my commission historically? Like
7 .007?"

8 And Vicki Borden responds with certain percentages,
9 and writes in the last sentence, "These will all change again
10 when the merger happens. I have no idea what we can do then
11 that will be fair."

12 And Brian Mosher responds, "Sounds good," and
13 indicates some other things.

14 And then in the highlighted portion, where Vicki
15 Borden responds back to him, starts with, "I understand. Not
16 difficult at all. I would prefer everyone know exactly how
17 their commission is calculated and communicate any concerns.
18 It would be very easy for me to calculate it incorrectly.
19 They have gotten so complicated. Watch it for a month or two
20 and let me know if it does not seem equal. We can always
21 revisit." Do you see that?

22 A I do.

23 Q Looking at Joint Defense Exhibit 335, it is from
24 Vicki Borden -- strike that, from Ron Carter to Vicki Borden.
25 And he states, "You were correct about the Canadian wholesale

1 not being on your commission. I had it in the input file but
2 it was not reading over to your commission. I have made" --
3 and this is from Vicki Borden. "I have made an adjustment of
4 6,610 for July-December on this month's commission. Sorry for
5 the mistake." You see that?

6 A I do.

7 Q Durning to Joint Defense Exhibit 336, and it begins
8 on the bottom -- sorry. That's-- This is from Scott Fenwick
9 to Vicki Borden, on May the 18th of 2009, and it is a
10 commission question. And it says, "Vicki and Vince, I was
11 reviewing March commission statement and have a question about
12 Bosselman/Town Pump gallons for national accounts. I see the
13 Bosselman/Town Pump commission at .01 per gallon," and it goes
14 on and describes what his concern is. The last sentence is,
15 "Not a huge amount of money, but with cap in place every
16 dollar matters."

17 And Vicki Borden responds to Scott Fenwick and Vince
18 Greco, "You are correct. I adjusted the commission that Mark
19 is signing today for April's business."

20 And then Scott Fenwick responds to Vicki Borden,
21 "Ok. Thanks for fixing March. I found same situation in
22 January-February, but dollars are nothing to get fired up
23 about and anyway it's my responsibility to catch these errors.
24 In my mind it's a wash." Do you see that?

25 A I do.

1 Q The next one, turning to Joint Defense Exhibit 337,
2 purports to be an e-mail from Vicki Borden to Ron Carter, and
3 it begins -- and it's on November the 9th, 2009, states, "I am
4 added a correction to your commission this month of \$818." It
5 goes to explain the reason, "The formula was wrong and your
6 restricted profit was not feeding over to your commission
7 sheet since July of 2008."

8 This e-mail is November 9th, 2009. "For all of 2008
9 and the first four months of this year you were capped, so it
10 did not affect your pay. It did not [sic] short pay you since
11 May. I calculated all the months, including the exchange fee
12 for that month, and came up with \$818.82. Don't hesitate to
13 ask me about anything that does not look right on your
14 commission. They are done in such a short time frame that
15 mistakes can happen." Do you see that?

16 A Yes, I do.

17 Q Looking at Joint Defense Exhibit 339. It states,
18 from Vicki Borden, on July 22nd, 2008, to Linda Stooksbury and
19 Janet Welch, regarding commissions, "In my rush to get
20 commissions finished so Mark could sign, I failed to pay the
21 manual commission on Keyboard, England, and CJM. I will pay
22 those next month. Sorry." Do you see that, Ms. Whaley?

23 A I do.

24 Q Turning to Joint Defense Exhibit 340, starting on
25 the very bottom. It's from Vicki Borden to Arnie Ralenkotter,

1 on August the 20th, 2009, and it reads, "I realized yesterday
2 that I adjusted your percentage to quota for the gallons that
3 were funded for Interactive Logistics, but I did not pay
4 commissions on these gallons. I will add them next month."
5 Mr. Ralenkotter -- well, strike that. Janet Welch responds to
6 Vicki. "Thank you, we need all the help we can get." Do you
7 see that?

8 A I do.

9 Q I think we have a couple more here, two more. This
10 is Joint Defense Exhibit 341, purports to be from Vince Greco
11 to Karen Crutchman, regarding Apex and Westar Customer List.
12 "Can you tell me again where this shows up on my restricted?
13 Wasn't on info we reviewed in Nashville last week."

14 To that, it appears Karen Crutchman forwards an
15 e-mail, at the very bottom there, to -- or responds to Vince
16 Greco, and says, "The conglomerates don't show up on the P&Ls,
17 just on the PRS reports and restricted tracking."

18 And it appears that Vince Greco responds to Karen
19 Crutchman, "I realize that, but I didn't see it on my
20 restricted."

21 And Karen Crutchman reaches out to Vicki Borden on
22 June the 4th and she writes, "If not on P&Ls, do you manually
23 adjust these each month for our commission?" to which Vicki
24 Borden responds, on June the 5th, 2012, "Because it will not
25 show up on the P&L, it is calculated and added to your

1 commission. Apex, CUSA, and Transam are on the manual
2 calculation for April. In looking at the calculation I do see
3 that the discount was not subtracted before the commission was
4 calculated. We will fix that going forward."

5 And, lastly, looking at Joint Defense Exhibit 325,
6 it is from Vicki Borden to Wendy Hamilton, "I am paying Holly
7 and Katy on this commission for the hedges they have done in
8 October. Don't usually do that, but because of Holly's new
9 house I offered and they took me up on it. Is it okay if I go
10 ahead and pay you for ABF or would you prefer that I wait?"

11 And the response is, "Sure thing." This is October
12 the 13th, 2008.

13 All right. Those are the e-mails I wanted to review
14 with you. And here is the question I have with regard to
15 those e-mails: Were you aware of these e-mail exchanges
16 between Vicki Borden and these other individuals at the time
17 when you received her commission breakdowns and processed them
18 for payment to the employees?

19 A No, I was not.

20 THE COURT: Are we still operating under the
21 presumption that everything contained in these documents is not
22 true and the witness should presume that they're not true?

23 MR. RIVERA: Yes, Your Honor.

24 THE COURT: So she is to assume that Vicki Borden did
25 not correspond, those people did not correspond, and the

1 information in the e-mails is not true? She's to assume that?

2 MR. RIVERA: Yes, sir, as I understand Your Honor's
3 instruction, that she's to assume that the assertions that are
4 made within the e-mails are incorrect or not true.

5 THE COURT: I thought that it was your intention,
6 that's why you wanted her to be able to see them, that no one
7 was to take anything in the e-mails as being true; that would
8 include the dates, the names, the contents, the words. Nothing
9 at all was to be assumed to be true. The jury cannot take it
10 to be true. Counsel cannot argue that anything in the
11 information is true, and I think that would include who the
12 e-mails are from and who they are to, wouldn't it?

13 MR. RIVERA: Yes, Your Honor.

14 THE COURT: So would you like to ask the question
15 again to the witness, then?

16 MR. RIVERA: Well, the question that I asked was,
17 Your Honor, if she was aware of these e-mails at the time when
18 she received the commission breakdowns and processed them for
19 payment to the employees.

20 A I was not aware of any e-mails, whether they sent
21 them or not.

22 MR. RIVERA: Those are my questions, Your Honor.

23 CROSS-EXAMINATION

24 BY MR. MURRAY:

25 Q Good evening, Ms. Whaley.

1 A Good evening.

2 Q How are you?

3 A I'm good. How are you?

4 Q Doing well.

5 MR. MURRAY: Ms. Lewis, could we get access to the
6 computer?

7 THE COURTROOM DEPUTY: It's on. Thank you.

8 BY MR. MURRAY:

9 Q Just briefly, Ms. Whaley, can you remind me of when
10 you started working at Pilot?

11 A March 2002.

12 Q And as a Pilot employee, your job is primarily
13 concerned with payroll matters. Is that correct?

14 A That is correct.

15 Q So you didn't bargain with customers on behalf of
16 Pilot, right?

17 A I did not.

18 Q And, more specifically, you never negotiated pricing
19 arrangements or --

20 A (Moves head from side to side.)

21 Q -- discount arrangements?

22 A No, I did not.

23 Q Okay. And based on your experience at Pilot in a
24 payroll position, a payroll manager really doesn't need to
25 know all of the details associated with Pilot's deals with its

1 customers, right?

2 A That's right.

3 Q In fact, a payroll manager at Pilot likely wouldn't
4 know those details, right?

5 A That's correct.

6 Q I mean, after all, your primary concern was simply
7 compensating Pilot's employees?

8 A Yes.

9 Q Thank you. I'd like to turn to some questions that
10 are specific to Ms. Jones. So after being directed to
11 Government's Exhibit 410, you testified that a portion of
12 Heather Jones' compensation was based on commission. Do I
13 have that correctly?

14 A Yes.

15 Q And now I'd like to look at the first page of that
16 document with you again. Just let me know when you've got it.

17 A I have it.

18 Q Okay. So Government's Exhibit 410 is the commission
19 breakdown for Heather Jones. What month are we concerned
20 with?

21 A It's February 2008.

22 Q And if you would, just look at the first five or so
23 rows on that page with me. Looking at those rows, we can see
24 how Brian Mosher's accounts impacted the company's profit. Is
25 that correct?

1 A Yes.

2 Q Now, I'd like to focus more specifically on that
3 fourth row. Do you see where it says, "Profit ADJ for manual
4 rebates"?

5 A I do.

6 Q Are we safe in assuming that "ADJ" means adjustment?

7 A That would be the logical assumption.

8 Q Would it be correct to say that all the manual
9 rebates paid to Brian Mosher's customers for this month
10 reduced company profit by \$54,443.76?

11 A That would seem to be what it indicates.

12 Q Okay. So this entry appears to be removing money or
13 at least subtracting money that was paid back to customers
14 from the profit calculation. Is that fair?

15 A On the surface of this document, that's what it
16 looks like, but I don't really know the details behind it.

17 Q I understand. But you would agree that company --
18 it really isn't company profit if it's paid back to the
19 customer, right?

20 A I don't know if it's paid back to the customer.

21 Q Okay. Well, based on the information provided in
22 that row, can you tell me what the impact of those payments
23 totaling well over \$50,000 in this particular month had on
24 Heather Jones' February compensation?

25 A Those would be negative amounts in the total

1 calculation of the payment.

2 Q Okay. So that's roughly \$40, then, right?

3 A Yes.

4 Q All right. So when the company paid out more than
5 \$54,000 to rebate customers, we see that Ms. Jones' commission
6 was reduced by roughly \$40, right?

7 A Yes.

8 Q Now, I'd like to make sure that I understand these
9 proportions correctly, so I'd like to give you a hypothetical.
10 If, for whatever reason, we learn that Pilot actually owed
11 rebate customers twice that amount, so roughly \$109,000, then
12 Ms. Jones' commission would have been cut by, what,
13 approximately \$80, if we looked at the proportions provided
14 here?

15 A Based on the proportion you're seeing here. I would
16 have to-- I really don't know what's behind all of these. If
17 you're asking if I see a negative number here, I do.

18 Q Right. Well, let's consider the opposite scenario,
19 then. If Pilot didn't pay out a single penny, if this \$54,443
20 entry said zero, would it be fair to say that the total
21 commission amount on that line would probably also say zero?

22 A Correct.

23 Q Okay. So, in that instance, Ms. Jones would have
24 kept the entire \$40, right, or at least that \$40 would not
25 have been reduced from her compensation for that month?

1 A If that was a zero -- is that what you're saying?

2 Q Yes, ma'am.

3 A -- then her commissions would not have had anything
4 in it, from that line.

5 Q Yes. I understand. And can you tell us what the
6 ultimate payment for Ms. Jones was that month, as far as
7 commissions?

8 A I'm sorry, what the what?

9 Q What her ultimate commission amount paid for this
10 month was.

11 A The commission was \$1200.58.

12 Q Okay. So keeping what we've discussed in mind,
13 would it be accurate to say that manual rebates and the amount
14 of manual rebates paid out had relatively small effect on
15 Ms. Jones' commission when we consider the other entries on
16 the document?

17 A What I can say is that adding this column, the Total
18 Commission column --

19 Q Uh-huh.

20 A -- I see all of those lines play into that total.

21 Q Okay. And so that amount, the \$40, is relatively
22 small when we consider the larger compensation amount of 1200.
23 Is that fair?

24 A Yes.

25 Q Okay. Now, I'd like to turn your attention to the

1 very last page of this document, staying within Government
2 Exhibit 410. So I'd like to compare the February 2008
3 breakdown that we just finished discussing with the document
4 that you see in front of you now. Does that make sense?

5 A Yes.

6 Q So this new page that we're looking at, it's also a
7 commission breakdown for Heather Jones, right?

8 A Yes.

9 Q And what time period does this page concern?

10 A This is June 2012.

11 Q So here, four years later, we see that Ms. Jones
12 received a significantly larger commission amount. Is that
13 fair?

14 A Yes.

15 Q So I'd like to ask you to help me figure out the
16 reason why the commissions increased so much from 2008 to
17 2012. Is it fair to say that this breakdown is a bit more
18 complicated or at least includes a lot more information when
19 we compare it to the February 2008 breakdown on the left?

20 A It has more components.

21 Q Yes. For one thing, it looks like the company's
22 revenue from Mr. Mosher, for example, from Mr. Mosher's direct
23 bill customers, has more than tripled, right?

24 A It has increased significantly, yes.

25 Q We also see some entries that are stemming from

1 profits in Canada. Is that correct?

2 A Yes.

3 Q And, now, by this time, in 2012, Pilot had, itself,
4 grown as a company, right?

5 A Yes.

6 Q I believe the merger had already occurred, right?

7 A Are you talking about the Flying J merger?

8 Q Yes, ma'am.

9 A Yes.

10 Q So it had also increased the number of locations or
11 Travel Centers situated across North America?

12 A Yes.

13 Q And following the merger, Pilot likely acquired
14 customers that had previously been fueling with Flying J,
15 right?

16 A They would still probably be fueling with Flying J.
17 That's hard to say, because the Flying J brand stayed.

18 Q Right, because Pilot had acquired that brand, safe
19 to say anyone fueling there would also now be --

20 A Yes.

21 Q -- technically fueling with Pilot Flying J, right?

22 A Yes.

23 Q Would it be accurate, then, to simply say that the
24 company was just bigger?

25 A Was what?

1 Q Just bigger?

2 A It was bigger, yes.

3 Q Okay. Referencing back to the June 2012 breakdown,
4 would it be accurate to say that Ms. Jones is now working for
5 three sales reps in 2012? We see Brian's direct bill, Rob's
6 direct bill, and Jonathan's direct bill, for example.

7 A That is what I see.

8 Q When we compare that to the breakdown from
9 February 2008, how many individuals do you see Ms. Jones
10 generating commissions from?

11 A Two.

12 Q Two. All right. And, then, one last factor that
13 appears different is the Rate column. Do you see that, the
14 third column on either page?

15 A Yes.

16 Q So for the majority of entries in the 2008
17 breakdown, it appears that Ms. Jones earned at a rate of
18 .00075. Would you agree?

19 A Yes.

20 Q And for the 2012 breakdown, she appears to have
21 earned at a rate largely of .00105?

22 A Yes.

23 Q And I'm sure you're better at math than I am, but
24 that's what, roughly? A 40 percent increase?

25 A Yes.

1 Q Along those lines? So over a period of more than
2 four years, Ms. Jones earned her commissions at a larger rate?

3 A Looking at this, yes.

4 Q So since we found several reasons for the increase
5 in Ms. Jones' commission, I'd just like for you to confirm
6 that I've identified these reasons correctly.

7 So, Reason 1, revenue from Brian Mosher's direct
8 bill customers had tripled, correct?

9 A Close to that, yes.

10 Q Reason Number 2, as we've stated, the whole company
11 itself had experienced enormous growth during that time?

12 A Yes.

13 Q Three, Ms. Jones was working for at least one more
14 sales rep?

15 A Yes.

16 Q And, finally, Ms. Jones' commission rate had
17 increased over her tenure at Pilot?

18 A Yes.

19 MR. MURRAY: Okay. Thank you very much for your
20 time, Ms. Whaley.

21 THE WITNESS: Thank you.

22 MR. MURRAY: No more questions, Your Honor.

23 CROSS-EXAMINATION

24 BY MR. COOPER:

25 Q Good afternoon, Ms. Whaley.

1 A Good afternoon.

2 Q I'm Jonathan Cooper. I represent Karen Mann.

3 A Nice to meet you.

4 Q Do you remember Karen?

5 A I do remember Karen.

6 Q I'm going to ask you some questions about the
7 exhibits the government showed you in your testimony. Let's
8 first, if we could, pull up Government Exhibit 405. Do you
9 recognize this summary?

10 A Yes, I do.

11 Q And I believe you testified that you had prepared
12 this summary?

13 A Yes.

14 Q I want to go over some of the figures on this and,
15 if we could, Ms. Whaley, highlight the row for hourly pay at
16 the very top, first row.

17 And -- actually, leave that there, that's fine.

18 Let me ask you some basic things about this. What
19 you've done on this summary, Ms. Whaley, if I'm understanding
20 this, is that for the years from 2008 to 2012 you have
21 provided the numbers for Ms. Mann's annual pay. Is that
22 right?

23 A Correct.

24 Q And those are broken down into various components?

25 A Yes.

1 Q And so she received different amounts of money for
2 different types of compensation?

3 A She did.

4 Q And the row that we have highlighted here is her
5 hourly pay --

6 A Yes.

7 Q -- right? So she was an hourly employee?

8 A Yes, she was.

9 Q She clocked in and clocked out?

10 A Yes.

11 Q And it looks like -- and so her hourly pay would be
12 essentially her annual salary, so to speak. Is that a fair
13 way of saying it?

14 A Yes, it would equate to that.

15 Q And it looks like her salary in 2008 was 32,500,
16 roughly. Is that right?

17 A Yes.

18 Q In 2008?

19 A Correct.

20 Q And it was virtually the same in 2009. Is that
21 right?

22 A Essentially, yes.

23 Q It goes up in -- a little bit in 2010, and goes up
24 again in 2011, and a little bit more in 2012. Is that right?

25 A Correct.

1 Q But from 2008 to 2012, she's paid essentially the
2 same hourly pay, right?

3 A Dependent on how many hours she worked each of those
4 components, but, yes, it's essentially --

5 Q Well -- well, we're going to see -- see if I'm right
6 about this. That's based on a 40-hour workweek, right?

7 A If she worked 40 hours.

8 Q I see. Okay. So it's possible that if she worked
9 less than that, then --

10 A That's right. Anyone who is hourly can work up to
11 or over 40 hours. So it could vary.

12 Q I see. All right. But -- but it would appear from
13 this -- and you prepared this. This would appear that her
14 salary -- she never got a raise of any significance during
15 this four-year period?

16 A Looking at that surfacely, on that one line, I would
17 say yes.

18 Q Okay. Now -- and \$32,000 is -- it seems like an
19 amount you would pay your clerical staff at Pilot. Is that
20 right?

21 A In 2008 it might not have been that high, but it
22 would be roughly, yes.

23 Q Okay. All right. Now, let's look at -- there is a
24 line for overtime.

25 A Yes.

1 Q So that would be -- and she worked -- she was
2 paid --

3 A Yes.

4 Q -- for overtime hours every single year?

5 A Yes, every year.

6 Q And that would indicate that at least on some of the
7 weeks she worked more than 40 hours?

8 A Yes.

9 Q Is that a fair amount for overtime? Is that a
10 pretty significant amount of hours to be working?

11 A For an annual amount, if you break it down, it --
12 probably 2011 was more significant than the others, but, yes.

13 Q Okay. But she was -- it would indicate that she was
14 working overtime more than, you know, one week a year?

15 A Yes, it would.

16 Q Okay. All right. Now, let's look at Commissions
17 Current Year, if we can look at that row. And we see here
18 that her commissions are actually more than what she was
19 getting paid for her salary.

20 A Yes.

21 Q And let's -- these commissions, I would say -- we're
22 going to go into this a little bit more, but preliminarily,
23 her commissions were based on diesel sales. Is that right?

24 A I'd have to look at her sheet to see.

25 Q We're going to get into that a little bit more in a

1 minute.

2 A Okay. Okay.

3 Q But commissions are -- they're tied to sales?

4 A Yes. Yes.

5 Q And we see here that in 2008 her commissions were a
6 little north of \$49,000. Is that right?

7 A That's right.

8 Q And in 2009, 41,000. And they go up to a high in
9 2012 of 67,000?

10 A Correct.

11 Q Now, you are aware that the conspiracy in this case
12 is alleged to have begun at least in 2008. Is that right?

13 A I'm not sure when it was alleged to begin, but that
14 is what I pulled, so...

15 Q And you were asked to pull these numbers at the
16 request of these lawyers here --

17 A Yes.

18 Q -- for the government?

19 A Not from the government. From our lawyers, yes.

20 Q Oh, okay. But they asked you to pull the figures
21 beginning with 2008?

22 A That's correct.

23 Q Now, if you look -- let's look at the commissions --
24 and we can just leave it right where it is. If we look at the
25 commissions from 2008 and 2009, am I reading this right, that

1 her -- the commissions that she earned in 2009 were actually
2 less than what she earned in 2008?

3 A The commissions that were paid in the current year,
4 yes, that's correct.

5 Q Okay. Well, okay, let's now turn to Government
6 Exhibit 411. And if we can just look at the first page of
7 that exhibit for now. I think by now we're familiar with what
8 this document is. You've testified about this for two other
9 individuals, and now we're going to look at Karen Mann's.
10 This is for November 2008, right?

11 A That's correct.

12 Q And I want to just appreciate exactly the scope of
13 what you're able to testify about today. When we look at --
14 we look at the last line, the Total To Pay, if we could
15 highlight that, and we see for this particular month, November
16 of 2008, we see a value of \$5,881.96, correct?

17 A Correct.

18 Q Is that right?

19 A Yes.

20 Q And you have verified that that is in fact the
21 commission Karen Mann was paid for November of 2008?

22 A That is correct.

23 Q And when -- and so you would have cut it -- would
24 you have cut a check, or was it direct?

25 A It would have been on her direct deposit.

1 Q Direct deposit. So we would expect to see a direct
2 deposit of this exact amount in her bank account.

3 A In December, because it would be the following month
4 that it's cut.

5 Q I got you. Okay. So -- right. I'm glad you
6 pointed that out. So November 2008 sales is for diesel fuel
7 sold in November of 2008.

8 A That's right.

9 Q But it's not -- the commissions aren't calculated
10 until the next month?

11 A At the end of the month, right.

12 Q Okay. Thank you for reminding me of that. Now --
13 but as far as this goes, that -- in December of 2008 --

14 A Yes.

15 Q -- when you received this commission breakdown, your
16 department's focus was on this \$5881?

17 A That is correct.

18 Q I assume, then, that you -- your department didn't
19 go back and verify the accuracy of any of the other numbers on
20 the commission, correct?

21 A No. We only verified the total amount paid.

22 Q Okay. And would you even add the column that the
23 Total To Pay was?

24 A No, we would not.

25 Q Okay. All right. But you testified a few minutes

1 ago for Mr. Rivera, I believe, that when you got these, you
2 trust that had they were accurate?

3 A That is right.

4 Q And a copy of this would have been given to Karen?

5 A I don't know that.

6 Q Okay. You don't know that. All right. Now, we're
7 looking here for November of 2008, and you can see that she
8 was getting commission based on the company profit for two
9 individuals?

10 A Yes.

11 Q Those are Tim Prins and then someone named Ron?

12 A Yes.

13 Q Do you remember Tim Prins?

14 A I do.

15 Q Do you remember -- do you know who that Ron is?

16 A Ron Carter.

17 Q All right. Very good. So -- and do you know, then,
18 that Karen Mann was supporting Tim Prins and Ron Carter as
19 their regional account representative?

20 A Yes.

21 Q And would it be fair to say, too, that there's
22 actually a small, tiny amount for a third representative,
23 outside sales representative? Do you see a -- on this last
24 line, under Tim, there is a direct bill and then, in
25 parentheses, "Sturdevan"?

1 A I see that, but I don't know who that is.

2 Q Do you remember Danny Sturdevan?

3 A No.

4 Q Okay. All right. Now, I think you said that you --
5 did you say you knew that Karen Mann was the inside account
6 representative for these two men?

7 A Yes.

8 Q And do you know which territory she was supporting
9 at this time?

10 A I don't.

11 Q That's fine. It's fair to say that Arnie
12 Ralenkotter -- what -- any profit that he made, Karen received
13 no commission on Arnie Ralenkotter's customers?

14 A I don't see that on the sheets I pulled.

15 Q Right. You didn't see them on any of the sheets
16 that you pulled. Is that fair?

17 A On these that I've been looking at and studying a
18 lot.

19 Q Right. Just the ones in the courtroom today?

20 A Yes, that's correct.

21 Q All right. You've testified about this, so this is
22 not going to be any tricky question for you, but if we look at
23 the Rate column, if we could highlight that Rate column, it
24 appears that this rate has an impact on the total commission
25 that's in the far right column. Is that fair -- is that a

1 fair statement?

2 A Yes.

3 Q And can you please testify as to -- for Tim Prins'
4 entries, what his rate was on -- on those amounts?

5 A On the direct bill and restricted, it's 225, but on
6 the wholesale it was just .2.

7 Q Well, let's --

8 A 002.

9 Q That -- those decimals make a pretty big difference,
10 don't they?

11 A Yes, they do.

12 Q And so what is .00225?

13 A That's 2.25.

14 Q Is that --

15 A Is that what you're asking?

16 Q Is that -- I'm relying on you here. So if I'm
17 wrong, tell me. But isn't .00225 -- point -- well, I'm not --
18 I'm terrible at this. It's less than one percent, isn't it?

19 A Yes, it is.

20 Q Okay. Thank you. And I've used this before. So
21 see if this is right. If you took a penny and you cut it into
22 four pieces, one piece of that penny is .00225?

23 A Yes.

24 Q Okay. And then for Ron's it's .002?

25 A Correct.

1 Q And which is higher, .00225, or .002?

2 A 2.

3 Q The .002?

4 A (Moving head up and down.)

5 Q Okay. Now, if we could go to Page 9 of this
6 exhibit, which is Trial Number 3217. A, yes. June of 2011.
7 And I want to, if we could, highlight the rate column again.
8 And here we have a little bit different people that she was
9 supporting. One is John, and one is Ron?

10 A Yes.

11 Q And what is the rate there that Karen was getting on
12 those commissions?

13 A On John, looks like on everything of his she got
14 0015.

15 Q And for Ron?

16 A I believe the same, except for his wholesale.

17 Q Right. So do you remember what she was getting paid
18 for -- let's look at -- let's leave it here, but do you
19 remember what her rate was for Tim Prins? .00225?

20 A Yes.

21 Q All right. Which is higher, .0015 or .00225?

22 A .0015 or .0025, is that what you're asking?

23 Q Yeah.

24 A 0015 or 0025?

25 Q Uh-huh. Which one is higher?

1 A 25 is higher.

2 Q So it would appear here that her rate was actually
3 cut?

4 A Yes.

5 Q I next want to turn to Government Exhibit 405A. And
6 if we could just start with Page 1. You recognize this,
7 right?

8 A I do.

9 Q All right. This is -- you call this a form PR260?

10 A Yes.

11 Q And this is, I believe -- correct me if I'm wrong.
12 There is something you called the parameters page?

13 A Yes.

14 Q And there is for Karen Mann?

15 A Yes.

16 Q I'm curious, how do you know it's for Karen Mann?
17 Because of the 3085?

18 A Yes. That's her employee number.

19 Q Okay.

20 A Not that I know everybody, but that's right.

21 Q Okay. You know Karen's? Do you know --

22 A I know it because I can look at the next page and
23 see whose name is on it.

24 Q Okay. All right. Let's look at the next page.

25 And -- can you see that okay?

1 A I can.

2 Q Now, tell us what this is.

3 A In the left-hand column, it's showing the earnings
4 codes.

5 Q Well, let -- let's back up from that. This is the
6 detail listing for Karen Mann, right?

7 A Right.

8 Q And this is the entire year of 2008.

9 A This is the summary at the end of the year.

10 Q Right. So from January of 2008 to December of 2008?

11 A Correct.

12 Q And, now, look at -- what's the gross pay there?

13 A The gross pay is 92,076.52.

14 Q And can we --

15 MR. COOPER: Ms. Manela, can we bring up 405 for
16 comparison? Can we stack those some way?

17 BY MR. COOPER:

18 Q And I think you testified to this on direct so I
19 apologize if I'm being overly elementary, but I think you said
20 that you used 405A to get 405. Is that right? You used the
21 numbers from 405A?

22 A Yes. We pulled it out of the same system.

23 Q Okay. So let me just show you here, the gross pay
24 for -- and the detail listing is 92 -- or 9 -- yeah, 92,076,
25 and that corresponds with your summary on four -- on

1 Government Exhibit 405?

2 A Yes.

3 Q They're the same. Okay?

4 A Yes.

5 Q So it's fair to say that we're -- you're using the
6 same numbers --

7 A Yes.

8 Q -- to arrive at the summary?

9 A Yes.

10 Q All right. If we could go back to looking at the
11 top document, the 405A, please. Now, if we look at 2008, her
12 gross pay was \$92,000?

13 A Correct.

14 Q And that's -- that's a pretty high number, isn't it?

15 A It is.

16 Q But let's look at some of the other numbers on this
17 detail. It looks like for the entire year she had tax
18 deductions of 23,000. Is that right?

19 A Yes. That's her federal, Social Security, and
20 Medicare combined.

21 Q All right. And then the next column over is other
22 deductions of \$9,591.29?

23 A Yes.

24 Q And then there are company deductions of \$11,289.01?

25 A Right. She didn't have those deducted. That's just

1 the company.

2 Q Okay. So her take-home pay was in fact 59,000 for
3 the year of 2008?

4 A That was the net pay, yes.

5 Q The net pay. That's -- that was her take-home pay,
6 right?

7 A Take-home pay.

8 Q All right. Now, let's go to Page 4, please. And
9 we're going to do the same thing. This is 2009; is that
10 right?

11 A Yes.

12 Q And her gross pay actually went down to 87,000 for
13 2009?

14 A Yes.

15 Q And she had tax deductions of \$21,000, other
16 deductions of \$10,482, and then company deductions of \$10,954,
17 leaving her with a take-home pay of \$56,000?

18 A Yes.

19 Q Okay. If we go to Page 6. This is 2010, right?

20 A Yes, it is.

21 Q And her gross pay went up this year, to \$98,000. Is
22 that right?

23 A It is.

24 Q But she had tax deductions, other deductions, and
25 company deductions, leaving her net pay of only \$62,000?

1 A Yes, but can I clarify? Company deductions are not
2 deducted from the employee.

3 Q Okay. Okay. So that would be, like...

4 A The Social Security and Medicare, the company has to
5 pay the same portion.

6 Q Okay. Okay. So that's -- so is that just -- I'm
7 glad you corrected me. So that's not -- that's not deducted
8 from the 98,000?

9 A No company deductions are.

10 Q Okay. All right. But it's still true, though, that
11 from the tax deductions and other deductions it's -- her gross
12 pay is reduced from 98,000 to a take-home pay of 62,000?

13 A Yes, that is right.

14 Q Okay. All right. Thank you. Now, this is 2010.
15 Let's go to 2011. I'm sorry, if we can go to Page 8. Oh,
16 we're already there. Sorry. So this is gross pay of 98,000.
17 Is that right?

18 A It is.

19 Q And this was about the same that she made in 2010?

20 A Very close.

21 Q Her take-home pay is \$61,000?

22 A Yes.

23 Q Right? And now Page 10, if we could, look at 2012.
24 And here she really goes up, right?

25 A Yes.

1 Q She has gross pay of 117,000?

2 A Uh-huh.

3 Q And her net pay still, though, is only \$73,000?

4 A Correct.

5 Q Those taxes will kill you, won't they?

6 A Under the other deductions there are some different
7 things that will impact that.

8 Q Okay. All right. Let's turn next to Joint Defense
9 Exhibit 1473. And if we could just have the whole thing
10 enlarged there. Can you see that all right?

11 A Yes.

12 Q Now, let me ask you if you recognize this report?

13 A Yes.

14 Q Do you remember generating this report?

15 A I remember it being generated in my department.

16 Q Okay. All right. So let's look at this. And,
17 again, I want to try the best we can --

18 MR. COOPER: If we can look at -- if we can
19 highlight, please, Ms. Manela, only years 2008 through 2012.
20 I'm throwing you a little bit of a curve here. Sorry. 2008 to
21 2012.

22 BY MR. COOPER:

23 Q Now, does that correspond with your summary in
24 Government Exhibit 405? If we could bring that up, 405.

25 A Yes, it does.

1 Q All right. Can we go back to the full exhibit now.

2 All right. So we have been looking at years 2008
3 through 2012. Now, if we could look at -- would it be
4 possible to look at 2008 to 2013.

5 All right. So this is essentially the same summary
6 that you had before, except that we've added the year 2013?

7 A Yes.

8 Q All right. Let's talk about that. Something very
9 significant happened to Pilot -- first of all, something very
10 significant happened to Pilot in 2010. Remember what that
11 was?

12 A Yes. That was the Flying J merger.

13 Q All right. That was a good thing, wasn't it?

14 A That was a good thing.

15 Q Something bad happened in 2013?

16 A Yes.

17 Q What was that?

18 A That was the company raid.

19 Q April 15th, 2013, right?

20 A Yes.

21 Q All right. Now, following the raid on April 15th,
22 2013, Karen Mann was not term -- once that raid happened,
23 Karen wasn't terminated from the company, correct?

24 A Correct.

25 Q She was employed all of 2013?

1 A Yes.

2 Q And we can just leave things just the way they are
3 right here. I -- can you see that all right on your screen?

4 A I can. It's not lining up exactly. It needs to
5 drop the back -- there we go.

6 Q Well, I really want to just focus really on the
7 columns for YE2012 and YE2013.

8 A Okay.

9 Q And you've testified that YE means year end?

10 A Yes.

11 Q And when we say year end 2012 and year end 2013 that
12 means the 365 days of 2012 and the 365 days of 2013?

13 A In payroll terms, it really means all the check
14 dates in 2012 and 2013, which may not be the 31st of December.
15 It could be the Monday of that last week --

16 Q Okay.

17 A -- just to make it clear.

18 Q All right. Ms. Mann's total salary in 2013 really
19 jumps up, doesn't it?

20 A Yes.

21 Q And her commissions really jump up --

22 A Yes.

23 Q -- in 2013?

24 A Correct.

25 Q Which includes how many months in 2013 after the

1 raid at Pilot?

2 A Seven.

3 Q Okay. And Ms. Mann was not terminated in 2014, was
4 she?

5 A I don't -- no, I don't think she was. I would have
6 to look at the dates to be sure.

7 Q Okay. Why don't we go back to the full version of
8 this document. And do you see a column there for YE2014?

9 A I do. And she was -- you're right. She was an
10 employee.

11 Q Okay. And you see -- what is the top title of this
12 report?

13 A Salary history 2014, present 9/29/14.

14 Q And does that indicate to you that present -- that
15 at the time this report was generated, the present date was
16 September 29, 2014?

17 A Yes, it does.

18 Q So this is not a full calendar year for 2014 --

19 A That's correct. Correct.

20 Q -- right? And are you aware, Ms. Whaley, that
21 Ms. Mann was not terminated in 2015?

22 A I'm not sure of her termination date.

23 Q Okay. If I told you that Ms. Mann continued to be
24 paid until May 15th, 2016, would that refresh your
25 recollection?

1 A Yes. There was a -- yes.

2 Q So she remained employed by Pilot --

3 A Yes.

4 Q -- for over three years after the raid?

5 A Correct.

6 MR. COOPER: Nothing further. Thank you very much.

7 THE COURT: Is there any redirect?

8 MR. HAMILTON: Yes, Your Honor.

9 REDIRECT EXAMINATION

10 BY MR. HAMILTON:

11 Q You were asked about a declaration on
12 cross-examination. I just want to ask you a couple of
13 questions about that. After you prepared the declaration and
14 when you were preparing for your testimony, were you asked
15 about whether or not there were signed versions of those
16 declarations -- excuse me -- of the commission breakdown
17 reports?

18 A Yes.

19 Q And were you asked to go gather those?

20 A Yes, I was.

21 Q As part of your preparation, were you also asked to
22 confirm whether or not the -- the original commission
23 breakdown reports that were part of your commission were the
24 same ones as the signed versions?

25 A Yes.

1 Q And did you identify that some of them were
2 different?

3 A I did.

4 Q And were the signed versions gathered so that they
5 could have been provided -- so they could be provided to the
6 defense?

7 A Exactly.

8 Q There were questions about -- that you were asked
9 about about the reliability of some of the commission
10 breakdown reports. Do you recall that questioning?

11 A If that's the -- are you referring to when I was
12 asked if that's what we paid?

13 Q The e-mails that you were shown.

14 A Oh, yes.

15 Q When the commission breakdown report is received by
16 the payroll department --

17 A Uh-huh.

18 Q -- what did the payroll department, again, in your
19 capacity as a senior manager, what is the payroll department
20 looking for to approve any payment associated with a
21 commission breakdown report?

22 A We're looking to be sure it has the total payment
23 amount and who approved it and we will not go look at the
24 columns. We will glance to make sure that bottom number is
25 not way out of line.

1 Q What is the significance of who approved it?

2 A Because it has to be in the direct report up and it
3 has to be a two-up approval. If my boss submitted one, his
4 boss had to approve it.

5 MR. HAMILTON: Can I go to the document camera,
6 please.

7 BY MR. HAMILTON:

8 Q This document is part of Government Exhibit 410.
9 It's Page Trial 3201 from 410, and is this a commission
10 breakdown report for Heather Jones from November of 2011?

11 A It is.

12 Q And who is identified as the approving authority for
13 this commission breakdown report?

14 A Scott Wombold.

15 Q And do you see some initials there?

16 A VB, for Vicki Borden.

17 Q And what does that indicate there?

18 A That indicates to me that Vicki sent it on behalf of
19 Scott Wombold's approval.

20 Q So did Vicki Borden not have approving authority?

21 A She did not.

22 Q Did Scott Wombold have approving authority?

23 A He did.

24 Q Directing your attention to Government Exhibit 403.
25 This is the summary related to Mr. Wombold. And based on the

1 headings of that, what is the -- what did -- would you just
2 read the heading of this document to us.

3 A The J. Scott Wombold Compensation 2008 through 2012.

4 Q So what are Mr. Wombold's initials?

5 A JSW.

6 Q Going back to Government Exhibit 410, this document
7 is Bates numbered Pilot doc 11332 for the record. Do you see
8 the initials JSW there?

9 A I do.

10 MR. RIVERA: Your Honor, I object to this. This is
11 beyond the scope of cross-examination.

12 MR. HAMILTON: May I respond?

13 THE COURT: You may.

14 MR. HAMILTON: I believe the reliability of these
15 documents was challenged by Mr. Wombold's counsel, and we are
16 just showing that Mr. Wombold approved a number of these
17 documents.

18 MR. RIVERA: That's beyond the scope, Your Honor. We
19 never addressed this document. We never addressed Mr. Wombold
20 approving any documents.

21 THE COURT: Were you suggesting only specific
22 documents may have been manipulated by -- I've forgotten the
23 lady's name -- or were you suggesting that as a whole the
24 documents that this witness had identified and sponsored into
25 evidence should not be relied upon by the jury?

1 MR. RIVERA: I'm not sure I follow the question, Your
2 Honor.

3 THE COURT: Okay. I do recall there were some
4 questions directed to this witness. I think there was some
5 conversation about whether -- is it Ms. Borders was either a
6 felon or was involved in some type of fraud, and we had a
7 discussion about what impeachment means. And I think that
8 there was some indication that the jury could not rely upon
9 either all the documents that this witness testified about or
10 at least some specific documents. So I was asking the
11 question, were you suggesting that all of the documents that
12 Ms. Borders had some involvement in should be questioned, or
13 were you only suggesting that a select few of those documents
14 should be questioned?

15 MR. RIVERA: No, Your Honor. I was -- what I was
16 suggesting and what I was showing is that Ms. Borden's
17 calculations, as they related to the preparation of these
18 breakdown reports, were unreliable, not that--

19 THE COURT: Which documents in particular? Which
20 ones?

21 MR. RIVERA: All of the documents that she went
22 through.

23 THE COURT: Okay. I think that would stand for all
24 of the documents.

25 MR. RIVERA: Right, Your Honor, but not the approving

1 authority. Not Mr. Hazelwood, Mr. Wombold, but simply the
2 calculations and the thought process that Vicki Borden employed
3 when she prepared these documents. That's the only thing I
4 challenged.

5 THE COURT: And I think the logical assumption would
6 be that Ms. Borders either put in too much money in people's
7 pockets or she was not putting enough money in people's
8 pockets, that is, that she was either defrauding the company or
9 she was defrauding individuals. I think what this document is
10 aimed to show by the government is that she was not the only
11 person with some responsibility for the -- for the numbers on
12 the documents. So wouldn't that be a fair response to the
13 cross-examination?

14 MR. RIVERA: I don't believe it is, Your Honor.

15 THE COURT: You don't believe it is?

16 MR. RIVERA: I don't.

17 THE COURT: Well, the Court overrules the objection.

18 BY MR. HAMILTON:

19 Q Whose signature is on Page 11332 of Exhibit 410?

20 A Based on the initials, I would think it was Scott
21 Wombold, but I don't know his signature as well as I do
22 Mark's.

23 Q Turning to Page 1133. Again, do we see initials
24 similar to the ones we were just looking at?

25 A Yes. And I can see the JS on the signature.

1 Q Indicating it's who's signature?

2 A Wom- -- Scott's. Scott Wombold.

3 Q And did Mr. Wombold have approving authority for
4 commission breakdown reports?

5 A He did.

6 Q Staying with Government Exhibit 410, directing your
7 attention to Page Trial 30204. Is this for February of 2012
8 for Heather Jones?

9 A It is.

10 Q And do you see initials there at the bottom of the
11 Total To Pay?

12 A JSW.

13 Q And whose initials are those?

14 A Scott Wombold.

15 Q Do you see an amount marked through and changed?

16 A I do.

17 Q And will you take a moment and take whatever time
18 you need to do this in Exhibit 410, and based on the exercise
19 that we just went through with a few of those documents, can
20 you tell us who are the people you identify as the approving
21 authority for Government Exhibit 410?

22 A (Witness complying.)

23 Q And as you view that, Ms. Whaley, I want to -- I
24 don't want to interrupt your train of thought, but I do want
25 to put some book ends in here. Particularly, look at the

1 page -- start with the first page, which is 11283, and
2 continue as quickly as you can, through 11322, and tell us who
3 appears to be the approving signature up to that point?

4 A Mark Hazelwood.

5 Q Then starting at Page 11323 and continuing to 11333,
6 and that would be--

7 A Continuing to where?

8 Q Through the end.

9 A Scott Wombold.

10 Q And approximately how many months is that?

11 A That is eleven.

12 Q Eleven months from 2011 through 2012?

13 A Correct.

14 MR. HAMILTON: No further questions.

15 THE COURT: Thank you, ma'am. You are free to go.

16 THE WITNESS: Thank you.

17 (Witness excused.)

18 THE COURT: Call your next witness.

19 MR. HAMILTON: Jennifer Dalmida.

20 JENNIFER DALMIDA,

21 called as a witness at the instance of the government, having
22 been first duly sworn, was examined, and testified as follows:

23 DIRECT EXAMINATION

24 BY MR. HAMILTON:

25 Q Some math might be involved. Ms. Dalmida has been

1 passed a calculator. That's why I said that. Ms. Dalmida,
2 would you please introduce yourself with your full name to the
3 jury.

4 A My name is Jennifer Dalmida. I work with Verizon
5 Wireless.

6 Q And what's your job at Verizon?

7 A I'm a senior analyst, who is a custodian of records
8 for the company.

9 Q So as a custodian of records, what do you
10 principally do for the company?

11 A Basically, I'm the keeper of all our business
12 records, so I interpret any type of cell tower information or
13 cell tower records that we produce in compliance to a search
14 warrant, court order, or a subpoena.

15 Q Are you on the road most days of the week?

16 A Yes.

17 Q Testifying in proceedings like this?

18 A Yes.

19 Q Let me direct your attention to Government
20 Exhibit 1901.

21 MR. HAMILTON: Could we go to the laptop, please.

22 BY MR. HAMILTON:

23 Q Before your testimony today, did you have a chance
24 to look at Government's Exhibit 1901?

25 A Yes.

1 Q And have you determined whether or not it's a
2 Verizon business record?

3 A Yes.

4 Q And is it a Verizon business record?

5 A Yes, it is.

6 Q I'm going to ask you a few questions about that so
7 you can help us understand how to interpret these documents,
8 and I'd like to go to Government Exhibit 1901-A, please.
9 First of all, is Government's Exhibit 1901 a multi-page
10 document?

11 A Yes.

12 Q Pages and pages?

13 A Yes.

14 Q And have we, in 1901-A, pulled out some of the
15 information on one of the pages?

16 A Correct.

17 Q Can you explain to the jury what the headings are
18 for the columns in this document?

19 A Absolutely. The first column we have is the mobile
20 directory none. We refer to that as the subscriber telephone
21 number for the records in which we produced.

22 The next column we have is a dialed digit number.
23 This would be the dialing pattern of our subscriber on
24 outgoing calls, and it would also indicate any type of number
25 that was used for routing.

1 The next column we have, the seizure date and time.
2 This would indicate the date and time that the call took
3 place, and this would be in military time.

4 The next column we have is the seizure duration, and
5 this would be the duration of the call in seconds.

6 And the next column we have is the calling party
7 number. This column would indicate who initiated the call.

8 Q So the mobile directory number, will I be using a
9 correct term if I refer to that has the subscriber number?

10 A Yes.

11 Q The subscriber number being the number of the cell
12 phone user whose records these are, is that correct?

13 A Correct.

14 Q I will refer to it as the subscriber number.

15 A Okay.

16 Q So I'm going to now go over to the seizure date, and
17 what does the seizure date tell us?

18 A This would indicate the time that the call occurred.

19 Q So is that -- and the seizure date column, is that
20 the day of the week on which it occurred?

21 A Correct.

22 Q Rather, the date. We don't know whether it's
23 Monday, Tuesday or Wednesday --

24 A The date and the time.

25 Q Right. And the time, you say military time, if --

1 if 1301 is military time, what would be the way in which
2 people who were not in the military would state that?

3 A 1:01 p.m.

4 Q And do you know whether or not this time is on
5 Eastern Time or Central Time or Mountain Time?

6 A Yes. It's on Eastern Time.

7 Q So the time in this record is Eastern Time?

8 A Correct.

9 Q And when we're looking at the duration column, what
10 does that tell us?

11 A That would be the length of the call in seconds.

12 Q So in order to know how many minutes what would we
13 have to divide this by?

14 A Sixty.

15 Q Now, let's just do some examples to make sure we
16 understand how we read this record. Go to the calling party
17 number. And, again, what is the calling party?

18 A This column would indicate who initiated the call,
19 who started the call.

20 Q Whether or not it was the subscriber or somebody
21 else?

22 A Correct.

23 Q So looking at the first row, the telephone number
24 that initiates the call is (865)268-0076. Is that correct?

25 A Yes.

1 Q And because we know who the subscriber is, who is
2 the number ending in 0076 calling?

3 A Our subscriber, 7148.

4 Q Going to the next column -- excuse me, the next row,
5 which is a -- this is an opportunity to do a little math, so
6 the duration is 121. Is that 121 seconds?

7 A Yes.

8 Q So how many minutes is that?

9 A This is a little over two minutes.

10 Q And who is the calling party?

11 A Our subscriber.

12 Q And how do we know that?

13 A The telephone number, (865)805-7148, is our
14 subscriber telephone number.

15 Q And who is our subscriber -- what number is our
16 subscriber calling?

17 A Our subscriber is calling (865)250-5150.

18 Q And what heading are you looking at to know what
19 number our subscriber was calling?

20 A Under the dialed digit number.

21 Q So we'll go to the next row and the next row. Who
22 is the calling party?

23 A (865)603-1505.

24 Q And who is (865)603-1505 calling?

25 A Our subscriber.

1 Q And how do we know that?

2 A Because it's an in-coming call.

3 Q And can you tell the jury what that unusual series
4 of digits is, where it says dialed digit number and then the
5 1.0868?

6 A So, typically, when we see that code -- the column
7 isn't open wide enough, but you'll notice this code on any
8 call that was forwarded to voice mail, because there's an
9 extra routing pattern that's used.

10 Q So we'll go to the next row and the next row and we
11 have a calling party number of (865)805-7148. So who is
12 initiating this call?

13 A Our subscriber.

14 Q And we know that because we can look over and see
15 the mobile directory number?

16 A Correct.

17 Q And who is our subscriber calling? What number --
18 what number is our subscriber calling?

19 A 544-0422.

20 Q And is this call a 29-second call?

21 A Yes, it is.

22 Q Going to the next -- the next row, who is the
23 calling party here?

24 A Our subscriber.

25 Q And what number is the subscriber calling at that

1 time?

2 A (865) 742-4501.

3 Q And, again, just to make sure that everyone is with
4 us here, do you see a time of 1838?

5 A Yes.

6 Q So in Eastern Time, what time is 1838?

7 A 6:38 p.m.

8 Q And go to the next row, please. And just to make
9 sure that everyone understands all the information here, what
10 is the date -- we've highlighted a row here that has 696
11 seconds, and what is the date of that call?

12 A June 9, 2014.

13 Q And at what Eastern Time?

14 A It would be 6:40 p.m. Eastern Time.

15 Q And approximately how many minutes does that take?

16 A And this one is 696 seconds, which is about 11
17 minutes.

18 Q And who initiates this call?

19 A (865) 742-4501.

20 Q And is that our subscriber?

21 A No.

22 Q So did our subscriber initiate this call?

23 A No.

24 Q What telephone number did (865) 742-4501 call?

25 A Our subscriber, (865) 805-7148.

1 Q So let's skip down and go to the next longest
2 duration call on here, and that is at -- the time column says
3 1852, so please focus your attention on that. And looking to
4 the calling party column at -- on June 9th, 2014, at 1852,
5 who -- what number initiates that call?

6 A (865)603-1505.

7 Q And what is the duration of that call?

8 A It's a little over eight minutes.

9 Q And what Eastern Time is this call made?

10 A It's 6:52 p.m. Eastern Time.

11 Q And the date of this call?

12 A June 9th, 2014.

13 Q And who -- what number is called?

14 A Our subscriber, (865)805-7148.

15 Q All right. Let's please direct your attention now
16 to Government Exhibit 1902. And before your testimony were
17 you able to confirm whether or not Exhibit 1902 is a Verizon
18 business record?

19 A Yes.

20 Q And is it in fact a Verizon business record?

21 A Yes.

22 Q Let me direct your attention to Government
23 Exhibit 1902-A. And were you able to determine that 1902-A is
24 a page from 1902?

25 A Yes.

1 Q And just to make sure that I did ask this question,
2 were you able to determine, going back to 1901 -- we don't
3 need to pull it up, but were you able to determine that the
4 exhibit that we looked at, 1901-A, was indeed a page that came
5 from 1901?

6 A Yes.

7 MR. HAMILTON: No further questions, Your Honor.

8 THE COURT: Cross-examination?

9 MS. BREVORKA: Yes, Your Honor.

10 CROSS-EXAMINATION

11 BY MS. BREVORKA:

12 Q Good afternoon.

13 A Good afternoon.

14 Q My name is Jenny Brevorka, and I'm one of the
15 attorneys that represents Mr. Hazelwood. I have one quick
16 question for you. I noticed throughout your testimony you
17 stated that the numbers on the records here represented the
18 subscriber that dialed or received a call. Is that correct?

19 A Correct.

20 Q The numbers actually represent the subscriber's cell
21 phone number actually receiving or dialing a call. From these
22 records you cannot tell whether the subscriber themselves
23 placed or received the call. Is that correct?

24 A Correct.

25 MS. BREVORKA: Thank you very much.

CROSS-EXAMINATION

BY MR. PLATT:

Q Hi, Ms. Dalmida.

A Hi.

Q My name is Robert Platt. I represent Mr. Wombold. Just following up on what Ms. Brevorka just asked you, the records that you referenced today, they don't have a way of verifying the content of the calls?

A No.

Q Okay. So if the content of the call was perfectly innocent and normal, the Verizon business records would have no way of reflecting that?

A Correct.

MR. PLATT: Okay. Thank you.

MR. VERNIA: No questions, Your Honor.

MS. COMPHER-RICE: No questions, Your Honor.

THE COURT: Any redirect?

MR. HAMILTON: No, Your Honor.

THE COURT: Thank you, ma'am. You're free to go.

THE WITNESS: Thank you.

THE COURT: We appreciate you're coming.

(Witness excused.)

THE COURT: Call your next witness.

MR. HAMILTON: Darren Seay.

THE COURTROOM DEPUTY: Pardon me. What was that

1 name?

2 MR. HAMILTON: Darren Seay.

3 DARREN SEAY,

4 called as a witness at the instance of the government, having
5 been first duly sworn, was examined, and testified as follows:

6 MR. VERNIA: Your Honor --

7 THE COURT: Yes.

8 MR. VERNIA: -- before Mr. Seay testifies, I'd just
9 like to move to voir dire the witness. As I explained to
10 Mr. Hamilton before lunch, we believe voir dire is necessary to
11 establish some preliminary questions of fact before he's
12 allowed to testify.

13 THE COURT: Is he an expert witness?

14 MR. HAMILTON: No, sir. This witness, the Court has
15 already ruled upon. He was the subject of a pretrial motion.
16 I'm not sure how much more you want me to go into, but, no,
17 he's not an expert witness.

18 THE COURT: Well, I asked that procedural question.

19 MR. HAMILTON: Yes.

20 THE COURT: Voir dire is common with experts. And
21 after the government first questions the witness to lay what
22 they believe is the foundation for the acceptance of the
23 witness, the opposite side then has a chance to examine the
24 witness further. We also can do that with regard to documents,
25 if an opposing party believes that the foundation for a

1 document has not been adequate, they can use the opportunity to
2 demonstrate the inadequates of it. This witness is, what, a
3 fact witness, then?

4 MR. HAMILTON: Yes, Your Honor. This witness, the
5 Court has already ruled, can provide lay opinion testimony.
6 This witness is the subject of a pretrial issue that was
7 thoroughly briefed by the parties and the Court has already
8 entered a ruling on this particular witness and ruled that this
9 witness may offer lay opinion testimony based on his experience
10 as a Pilot employee.

11 THE COURT: Okay. And you'd like to voir dire him,
12 then, on his experience as a Pilot employee?

13 MR. VERNIA: Your Honor, I think that it's -- there's
14 no dispute that Mr. Seay is not a percipient witness as to
15 anything at issue in the case prior to the search at Pilot
16 Flying J.

17 The Court's ruling in October, Docket Number 274,
18 was that excluding such testimony before trial was not
19 warranted. We've had the opportunity to have many days of
20 trial. I think that it's -- given his unusual situation as a
21 nonpercipient witness who is being -- whose opinions are being
22 offered under Rule 701, and now that he's here and can
23 actually respond to questions regarding the foundation that he
24 may or may not possess for his testimony, that it's
25 appropriate to voir dire him.

1 THE COURT: And even though this witness is not an
2 expert, if he's going to offer opinions there still has to be a
3 foundation for the opinions, and I'm assuming the government
4 will attempt do that. Would it make more sense after the
5 government makes what it believes is the appropriate foundation
6 to allow the defense to examine the witness on that foundation?

7 MR. VERNIA: Your Honor, that -- that would be
8 acceptable to us.

9 THE COURT: Okay. So, Mr. Hamilton, if you don't
10 mind, why don't you spend the first part of your examination
11 just on the foundations. When you finish with the foundations,
12 then the defendants will have a chance to examine the witness.
13 And after that, we can argue the point, and assuming which way
14 the arguments, the witness may or may not be able to offer his
15 opinions. Does that make sense?

16 MR. HAMILTON: Yes, sir.

17 THE COURT: You may proceed.

18 DARREN MATTHEW SEAY,
19 called as a witness at the instance of the government, having
20 been first duly sworn, was examined, and testified as follows:

21 DIRECT EXAMINATION

22 BY MR. HAMILTON:

23 Q Would you please introduce yourself to the jury?

24 A Sure. My name is Darren Matthew Seay.

25 Q And where do you work?

1 A I currently work at Pilot Flying J.

2 Q And how long you have worked there?

3 A Over 15 years.

4 Q Would you walk us through your career at Pilot,
5 please?

6 A Sure. I first entered Pilot as a fuel accountant
7 within the fuel accounting department. I served that role for
8 June of 2002 through May of 2004. In June of 2004, I was
9 promoted to fuel accounting supervisor. Would you like me to
10 go through my job roles as well?

11 Q Actually, I would appreciate if I could ask you some
12 specific questions about your job as a fuel accountant.

13 A Sure.

14 Q And so, in your first -- is that your first two
15 years, 2002 to 2004?

16 A (Moving head up and down.)

17 Q What were your responsibilities as a fuel
18 accountant?

19 A Okay. As a fuel accountant, my primary
20 responsibility was in the research, reporting and accounting
21 into our store fuel margins.

22 Q And what is a store fuel margin?

23 A So a fuel margin would represent the profit or loss
24 our company makes on the sale of fuel at our retail locations.

25 Q And from -- from an accounting standpoint, how is

1 profit expressed at Pilot?

2 A So, to compare profitability across our retail
3 locations, we express it as a cents per gallon amount.

4 Q So after a couple of years as a fuel accountant,
5 what did you do?

6 A So I was promoted to the fuel accounting supervisor.
7 In that role I supervised the fuel margin team, which is the
8 team I previously resided within, which performed similar
9 duties.

10 Q And in that role you were just supervising people
11 who were doing the same thing?

12 A Correct. Yes.

13 Q And how long do you that?

14 A I did that for four years.

15 Q So when does that bring us to?

16 A I believe that brings us to 2008, June.

17 Q What was your next job at Pilot?

18 A Next I was promoted to the fuel accounting manager.
19 In that role I managed both the fuel margin team I previously
20 supervised, and I also took on the additional responsibilities
21 of the fuel payables team. That team was responsible for the
22 reconciliation and payment of all fuel-related invoices.

23 Q And what -- could you describe the components of
24 that reconciliation process. Generally speaking, what would
25 be required to be done as part of the reconciliation process?

1 A Looking at historic fuel margins?

2 Q Yes.

3 A Commonly, as most store margins report in a cents
4 per gallon amount, if there were multiple locations in the
5 same market, you'd expect obviously the fuel margins to be
6 similar, so we commonly would receive questions regarding
7 stores that had dissimilar fuel margins. We would then look
8 into those margins to determine was it an issue with the --
9 was there a difference in the retail price at the locations or
10 was there a difference in the cost of the product or we also,
11 in the case of what we call net fuel margin, we would look
12 into the accounting behind customer discounts. We'd also look
13 at credit card fees, transaction fees, and any expenses
14 related to our loyalty program.

15 Q So when you say cost of the product, what do you
16 mean?

17 A So product cost is comprised of both the fuel cost,
18 which is the cost of the raw product we pay a few supplier.
19 Also, we would have to remit taxes and pay taxes for any fuel
20 product we sold. And then the freight, which is the
21 transportation between the source terminal where the fuel was
22 picked up and then delivered to the retail location.

23 Q About how long did you do that at Pilot?

24 A Well, I -- of course, I did that either in a direct
25 hands-on experience or either as a manager and supervisor for

1 that cumulative, I guess about 12 years, so...

2 Q How long were you a fuel accounting manager?

3 A Four years. Actually, three and a half. I believe
4 it was June of 2008 through December of 2012.

5 Q And after your -- after your job as a fuel
6 accounting manager, what did you do?

7 A I transitioned to manage -- my role was the manager
8 of business intelligence and decision sciences. In that role
9 the department that I managed has two primary
10 responsibilities: One is business intelligence and one is
11 data analytics or data science.

12 Q So could you describe to us what business
13 intelligence is?

14 A Sure. Business intelligence involves the access,
15 usage, and availability of data, so we would help empower the
16 organization to leverage data to make better decisions. A
17 common example of this would be operational reporting.

18 Q What is operational reporting?

19 A Operational reporting would be routine reports that
20 were distributed to a business partner to help them make a
21 more informed decision. One example of this would be, we do
22 daily, weekly, and monthly reporting for our store management
23 in the field, to help them operate their travel centers, so...

24 Q So what sort of skill set is required to assimilate
25 data like that to make a useful product?

1 A First, we try to develop a deep understanding within
2 the business unit we're trying to support, so understanding
3 how they're going to utilize the report or the data. Then
4 we'd also have to have the technical skill sets required to be
5 able to create and automate the distribution of the reports.

6 Q Did that describe what we were just talking about
7 the category of business intelligence?

8 A Correct.

9 Q And was there another category?

10 A So data analytics or we also refer to it as data
11 science, that team typically applies complex calculations,
12 using mathematics or statistics to Pilot-generated data to
13 help make a more informed decision.

14 An example of that would be creating a sales
15 forecast. We would try to predict how much of a product we
16 would sell in a future period so we could either make sure we
17 purchase enough of the product or it could be labor scheduling
18 or other labor issues around the sale of the product.

19 Q Again, what kind of data assimilation skill set is
20 required to be effective in what you just described?

21 A So, similarly, we also develop a knowledge of the
22 business requirements and understand the business objectives
23 and how they're going to utilize the output of any product our
24 team would produce.

25 Then, again, there would have to be technical skill

1 sets and expertise typically in computer science or
2 mathematics to be able to perform the calculations required to
3 produce the models, so...

4 Q What is your educational background?

5 A So I received my undergraduate with a double major
6 in both mathematics and studio music and jazz, so the jazz
7 degree was a performance-based degree, so...

8 Q Okay. And do you have any advanced degrees beyond
9 that?

10 A I do. I also returned to complete a master's of
11 accountancy with a systems concentration, as well. All
12 received from UT in Knoxville.

13 Q During your work as a manager of business
14 intelligence and decision sciences, did you have a reason to
15 use something referred to as a Power Pivot table?

16 A Correct. I did -- Power Pivot's a useful tool, and
17 I -- I like to qualify it as, like, we use it a lot for
18 prototyping so we have a process. We need to help automate
19 either a calculation or reporting and the like. We -- that's
20 a common tool that we would utilize.

21 Q What is a Power Pivot tool?

22 A So Power Pivot is an add-in to Microsoft Excel. So
23 Microsoft Excel is the foundational product. It leverages
24 databased functionality within the Microsoft Excel platform.
25 So it's much more robust than the standard spreadsheet that

1 you'd be used to if you're familiar with Microsoft Excel,
2 so...

3 Q Let me direct your attention to April 15th of 2013.
4 And were you at Pilot headquarters on that day?

5 A I was.

6 Q What building were you working in?

7 A I was in the main building, the top of hill.

8 Q Is that 5508?

9 A Oh, yes. Yeah, Lonas Drive.

10 Q So 5508 Lonas Drive in Knoxville, Tennessee?

11 A Correct.

12 Q Is that where you were working on April 15th of
13 2013?

14 A Yes.

15 Q What happened that day?

16 A The government raided our locations to perform a
17 search.

18 Q After the April 15th, 2013 search warrant at Pilot
19 headquarters, internally, what, if anything, did Pilot do with
20 its trucking company accounts?

21 A So, initially, after the raid we tried to understand
22 the breadth of the alleged fraud that had occurred. We then
23 tried to determine what was owed to any customer, and then, of
24 course, we tried to get them paid back as soon as possible.

25 Q Was there an audit that occurred?

1 A Yes. We performed an audit of all of our customer
2 accounts as a result.

3 Q When you say "we," who do you mean?

4 A We created an audit team within Pilot. It was
5 comprised of our inventory audit team, also other accountants
6 serving in other roles throughout the organization.

7 Q Did you participate in the audit?

8 A I did.

9 Q What role did you play in the audit?

10 A I had two primarily roles. My first was as a senior
11 manager on the audit team, that role. I reviewed the work
12 product of the auditors that were performing the customer
13 audits.

14 And then my secondary role was as a technical lead.
15 So I would help -- my responsibilities were to understand the
16 source systems surrounding the customer discount process,
17 obviously the data generated, and then I would help supervise
18 any creation of any technical tools that would be required to
19 help facilitate the audit process.

20 Q At any time did anyone from the United States
21 government ask Pilot to conduct the audit that you were
22 describing?

23 A No.

24 Q Was this initiated by the company on its own?

25 A Yes.

1 Q After the raid, as you described it?

2 A Correct. After April 2013, yes.

3 Q From your work at Pilot and particularly during the
4 audit, did you become familiar with a customer referred to as
5 a manual rebate customer?

6 A Yes.

7 Q And what is that?

8 A So manual rebate customers were customers that would
9 receive a monthly rebate payment based on their purchases of
10 fuel at our retail locations for the prior month.

11 Q And from your work at Pilot and during the audit did
12 you become familiar with a customer called an off-invoice
13 customer?

14 A Yes.

15 Q Did the audit that you participated in and
16 supervised review manual rebate customer accounts?

17 A Yes.

18 Q And did that audit also review off-invoice customer
19 accounts?

20 A Yes.

21 Q In total, adding the off-invoice and the manual
22 rebate customer accounts, approximately how many customer
23 accounts were identified as being -- as having a need for an
24 audit?

25 A Well, we audited all accounts just to be sure. So

1 we performed on audit of over 7,000 accounts in total.

2 Q When the audit began, did Pilot have a data
3 processing tool to look back in time to accurately and
4 efficiently recalculate discount savings on the scale that
5 we're talking about?

6 A No. We had no tool.

7 Q So how -- and, again, what was the total number of
8 customers that needed to be looked at?

9 A Over 7,000.

10 Q So as part of the -- as a supervisor in the audit
11 team, what did -- what did you -- based on that knowledge,
12 what did you-all do to tackle that infrastructure issue?

13 A So we developed two primary tools that would help
14 the process of what we referred to as repricing our customer
15 accounts to determine any discount amount that was due. The
16 first was the Power Pivot manual rebate tool. And the second
17 was the off-invoice Power Pivot repricing tool.

18 Q Did you participate in the creation of those tools?

19 A I did.

20 Q And did you supervise the creation of those tools?

21 A I did, so...

22 Q Was the integrity of those tools tested?

23 A It was, extensively, yes.

24 Q Did you participate in that?

25 A Yes. I led those efforts.

1 Q And what does that mean? What is testing the
2 integrity of a tool like that?

3 A So, obviously, it's a complex calculation. So we
4 wanted to make sure the output of any tool we utilized was
5 accurate. So we did two types of comparisons. One was more
6 of a manual comparison, where we actually do it by hand, so to
7 speak, based on the calculation that was being applied, to
8 make sure that the numbers coming out of the tool were
9 correct.

10 We also did -- we commonly did this for a very large
11 number of accounts, especially with the off-invoice customers.
12 The source system that was used for our customer discount
13 price has a historical record of what discounts were in place
14 over time, so we were able to use the newly-developed tool to
15 reprice our customer transactions, utilizing the deal or the
16 discount that was in place historically; thus, the output of
17 that tool would then be compared to the original invoices the
18 customer had received and make sure that they were materially
19 in line.

20 Q I believe one of the tools you identified was the
21 Power Pivot manual rebate tool. Is that correct?

22 A Correct.

23 Q Can you describe to the jury what the function of
24 that tool was?

25 A So the Power Pivot manual rebate tool would

1 determine the original rebate amounts that were paid to our
2 customer. It would then calculate what rebate amount should
3 have been paid to a customer based on the results of the
4 audit, the discount terms that were identified during the
5 customer audit. It would then calculate any amount that was
6 now due to the customer.

7 Q Did you also identify a tool you referred to as an
8 off-invoice Power Pivot repricing tool?

9 A Yes.

10 Q And what was the function of -- may I just refer to
11 it as the off-invoice tool and you understand what I'm talking
12 about?

13 A (Moving head up and down.) Okay.

14 Q So what was the purpose, what was the function of
15 the off-invoice tool?

16 A So the off-invoice tool would determine the original
17 invoices that were sent to our customers. It would then
18 calculate what those invoices would have been had the
19 identified discount during our audit been applied, and thus,
20 determine any amounts owed to a customer.

21 So the scale between the two tools again, manual
22 rebate customers received a rebate payment subsequent to their
23 fuel purchases, while off-invoice customers received a reduced
24 invoiced amount to apply any discount received as a result,
25 so...

1 Q And just for ease of reference, may I refer to the
2 first tool as the manual rebate tool?

3 A Yes.

4 Q So what categories of data were needed to be able to
5 perform the calculations that were set up to be performed by
6 the manual rebate tool and the off-invoice tool?

7 A Okay. The tools -- the first data source that we
8 would have to -- we would need would be, obviously, the
9 customer fuel purchases. The second would be the OPIS price
10 index amounts, which would be utilized as the foundation for
11 our cost-plus and cost-minus customers. In the case of the
12 manual rebate tool, we also had to supply the retail price at
13 our locations by day and also had a way to input -- or the
14 original rebate amounts that were paid.

15 Q So the first category, that would -- was that how
16 much the customers purchased?

17 A Uh-huh. Yes. The purchase -- the purchase volume
18 for our -- excuse me -- the purchase volume for our customers
19 by location.

20 Q And would that be gallons?

21 A Yes.

22 Q Gallons by location?

23 A Correct.

24 Q Where did that data -- where did that data come from
25 to -- to -- to create the data needed for the Power Pivot

1 tools?

2 A In case of the manual rebate tool, that data was
3 obtained via PRS. In the case of the off-invoice tool, we
4 retrieved that data from the PM -- excuse me -- the PMIS
5 system and the Ascend System, so Ascend replaced PMIS during
6 the audit period.

7 Q So starting with the -- so the off-invoice got data
8 from PMIS/Ascend?

9 A Correct.

10 Q And can you tell the jury what Ascend -- I'm going
11 to refer to it as Ascend/PMIS. I'll try to be consistent.

12 A Correct.

13 Q So could you tell the jury what Ascend/PMIS is?

14 A Yes. Those tools' primary function was to help
15 facilitate the creation of the customer invoices. Commonly,
16 it would apply a discount and the invoice amount would be --
17 would reflect a discount off their invoice; thus the term,
18 off-invoice customers, so...

19 Q So the Ascend/PMIS, is that a database of
20 information?

21 A Correct.

22 Q And does that contain -- is that data data that's
23 kept in the regular course of Pilot business?

24 A It is.

25 Q Over a -- was it kept over years and years?

1 A Yes, multiple.

2 Q The second category you mentioned was PRS?

3 A Correct.

4 Q And what is PRS?

5 A PRS is a third-party data aggregation customer that
6 would collect the fuel transactions by our -- for our
7 customers at our retail locations and then remit that data to
8 us.

9 Q And what did Pilot do with the PRS information that
10 it obtained?

11 A We would load the PRS information into our Price
12 Fetch system.

13 Q And how long had -- so April 15th, 2013 is the date
14 that I know is memorable to the company. Before April 15th of
15 2013, had Pilot been using PRS data for years and years?

16 A Yes.

17 Q And was it the regular course of Pilot -- was it the
18 regular course of Pilot business activities to integrate PRS
19 data into its business records?

20 A Yes.

21 MR. VERNIA: Objection. Lack of foundation.

22 THE COURT: Huh?

23 MR. VERNIA: I don't think it's been shown yet that
24 this witness has any knowledge of what a -- personal knowledge
25 of what happened prior to April 15th of 2013, with respect to

1 these systems.

2 THE COURT: Mr. Hamilton?

3 MR. HAMILTON: Yes. May I ask some follow-up
4 questions to make sure? I believe the foundation has been
5 established, but may I just ask a few more questions to do
6 that?

7 THE COURT: I think the objection was only to whether
8 the use of this particular software or package or application
9 was incorporated into the further business affairs of the
10 company. I think the objection was that he would have had no
11 way of knowing what was going on prior to the time that he
12 conducted the audit.

13 MR. HAMILTON: Well, my question would be during the
14 course of the audit, did you determine whether or not PRS data
15 was used. May I ask that question, Your Honor?

16 THE COURT: Of course.

17 BY MR. HAMILTON:

18 Q So during the course of the audit -- and what time
19 period -- let me ask you this: During the audit what time
20 period was audited?

21 A So, we initially focused on 2008 through 2013. We
22 later realized the problem was occurring prior to 2008. So we
23 expanded the audit to look all the way back to 2005.

24 Q So during the course of the audit, were you able to
25 determine whether Pilot made it its regular course of business

1 activity to incorporate -- to integrate PRS data as part of
2 its business records from 2005 through 2013?

3 A Yes.

4 Q And did it in fact do that?

5 MR. VERNIA: Objection. Hearsay.

6 THE COURT: Overruled.

7 BY MR. HAMILTON:

8 Q And did Pilot in fact integrate PRS data into its
9 business records from 2005 through 2013?

10 A Yes.

11 Q During -- during the audit were you able to
12 determine that Pilot relied on the PRS data in its day to day
13 business activities from 2005 through 2013?

14 A Yes.

15 Q And just to clarify, in case there's any doubt about
16 this at all, during the time that you were auditing these
17 customer accounts, were you a Pilot employee?

18 A Yes.

19 Q And did you conduct any audits during the time that
20 you were auditing it as a Pilot employee at the government's
21 request?

22 A No.

23 Q I believe that the second category that you
24 mentioned was -- was OPIS, and that the third category that
25 you mentioned was the average retail price -- or the retail

1 price?

2 A Correct.

3 Q I'd like to start with -- I'd like to go to the
4 third category before we get to OPIS.

5 A Okay.

6 Q We can do it out of the order in which you did.
7 Where is the data for the retail price coming from to support
8 the manual rebate and the off-invoice tool?

9 A It's the Lawson database. So Lawson is an
10 enterprise tool we use for a variety of things within our
11 organization, so we --

12 Q So what does that mean? So what is an enterprise
13 tool?

14 A So an enterprise tool would be something we use
15 across multiple departments, serving a lot of different
16 business functions. So Lawson is a third-party tool or -- I
17 say tool -- in this case it's a software. So Lawson's a
18 software. It has a database behind it. We have modules to
19 help facilitate -- it's our financial module, so the general
20 ledger system and all the financial accounting that's done in
21 our organization is done through the Lawson system. We also
22 have an accounts payable module to -- we help perform the
23 accounts payable duties. We've had some payroll functionality
24 as well. And we also have the ability to develop our own
25 customized -- we utilize the user interface of Lawson. So

1 it's a screen that an employee would use to do their job. We
2 can customize that to help facilitate some of our business
3 processes that are unique to Pilot. So in this case, we have
4 pricing screens for our retail price group, which is how we
5 captured those retail prices that we used.

6 Q So is Lawson a software program? And to the -- to
7 the most pedestrian layperson, is Lawson a software program?

8 A Yes.

9 Q And is there data that that Lawson software program
10 manages?

11 A Yes.

12 Q Does Lawson allow access to that data?

13 A Yes.

14 Q And is the data that is managed and supported by the
15 Lawson system data that is kept and maintained in the ordinary
16 course of business at Pilot?

17 A Yes.

18 Q And was -- is that true for the data that the manual
19 rebate and the off-invoice tools were accessing to support
20 those tools?

21 A Yes.

22 Q And to go a little deeper, what was the data that
23 was being pulled from the Lawson database to support the
24 off-invoice and manual rebate tools?

25 A We would obtain the retail price by store, by day,

1 by product.

2 Q And was that data kept and maintained in the
3 ordinary course of Pilot business?

4 A Yes.

5 Q I'm reluctant to go backwards, but I want to make
6 sure that I clarify what Ascend/PMIS is. Are Ascend and PMIS
7 also software programs?

8 A Yes.

9 Q And do they manage data in the same way conceptually
10 as Lawson?

11 A Con- -- yes.

12 Q All right. The -- again, when you identified them,
13 it was the second category that you mentioned, but this will
14 now be the third category that we're going to discuss, OPIS.
15 Can you tell the jury what OPIS stands for?

16 A Oil Price Information Service.

17 Q And are you familiar with what OPIS is --

18 A Yes.

19 Q -- and what it does?

20 A Yes.

21 Q All right. And can you tell the jury from your
22 experience-- Let me ask you this: Before you came to work at
23 Pilot, did you have any idea about OPIS?

24 A No.

25 Q All the information you've learned from OPIS has

1 been from your work experience at Pilot?

2 A Yes.

3 Q And during your work at Pilot -- when did you first
4 need to learn about OPIS and what information it provided?

5 A When I was working within the fuel accounting
6 department, our supply and logistics team would commonly use
7 OPIS price indexes as a benchmark to determine how well they
8 purchased fuel, and the logistics team similarly used it for
9 how well they reduced costs.

10 Q And you were doing the fuel manager -- the fuel
11 accounting, that was back in -- from 2002 through what time?

12 A December 2012.

13 Q During the course -- well, from your time at Pilot
14 from two thousand -- to even before the audit, did -- was it
15 Pilot's regular course of business activity to incorporate
16 data it received from OPIS into its business records?

17 A Yes.

18 Q And did Pilot rely on that integrated data in
19 conducting its day-to-day operations?

20 A Yes. I think I have a correction. I think-- The
21 fuel accounting manager was through December of 2011. So
22 January 2012 forward was when I served my current role. So
23 I've been in my current role for six years, so...

24 Q All right. So you described the use of OPIS so
25 that, I believe, Pilot could see whether or not it was -- it

1 was making good -- I know I'm not saying it exactly how you
2 did, but so that Pilot could assess how well it's purchasing
3 fuel?

4 A Correct.

5 Q And so how would that -- how would that be done?

6 A Okay. So OPIS average represents the average
7 wholesale fuel cost for a particular market or terminal city.
8 We would then compare how well we purchased and transported
9 fuel versus that industry benchmark on -- basically
10 representing the market average cost.

11 Q All right. During your work at Pilot in your
12 various roles, have you ever taught other employees about how
13 OPIS -- how the OPIS contract average works and is calculated
14 and how OPIS works generally?

15 A Yes. I -- for my current team, we do, especially
16 over the last -- over probably three and a half years, we've
17 been very focused on our efforts around the fuel department,
18 so fuel sales, fuel pricing, supply and distribution. So as a
19 result, from an on-boarding perspective, I conduct a training
20 course on the fuel systems and data surrounding our key
21 decision points and how we price fuel, how we purchase fuel,
22 how we transport fuel, and then how we sell fuel.

23 Q And does that course have a name at Pilot?

24 A No, it's just something -- I call it Fuel 101, I
25 guess, is the closest thing to a title.

1 Q And during that course do you teach employees about
2 OPIS?

3 A Yes, extensively.

4 Q If I gave you a white board today, would you be able
5 to help us with a little bit of that?

6 A I'd be glad to.

7 MR. HAMILTON: Your Honor, may I set up a white board
8 so that Mr. Seay may do that?

9 THE COURT: Yes.

10 MR. HARDIN: Your Honor, may I inquire if there might
11 be a restroom break in the offing anytime soon?

12 THE COURT: Why don't we do it now. Why don't we try
13 to come back at ten minutes after the hour.

14 MR. HARDIN: Thank you, Your Honor.

15 (Brief recess.)

16 THE COURT: Mr. Hamilton, you may proceed.

17 MR. HAMILTON: Yes, Your Honor.

18 BY MR. HAMILTON:

19 Q Before we had our break, we were about to begin a
20 discussion of OPIS. And before you step down to come to the
21 white board, I want to show you something on the screen.
22 Could you go to Government's Exhibit 302, please?

23 Exhibit 302 is a page of the direct sales manual.

24 MR. VERNIA: Your Honor, I object to further
25 questions. It appears that he's past the foundation point and

1 is moving into the assumptions and testimony.

2 MR. HAMILTON: Your Honor, may I respond to that?

3 THE COURT: Of course.

4 MR. HAMILTON: Mr. Seay has testified that there were
5 two tools that he helped construct for the audit, and he is in
6 the process of explaining the data that was pulled for those
7 tools to be operational and useful in the audit. At the end of
8 the -- at the end of this portion of the testimony, what I
9 believe that the Court is going to hear is that Mr. Seay,
10 through his knowledge and experience at Pilot, helped to
11 construct the tools that were used to determine whether or not
12 a customer had actually received an accurate discount savings
13 during the course of time in question.

14 At the end of the testimony, I believe what the
15 Court is going to find is that Mr. Seay helped -- helped to
16 create a massive calculator that could be used uniformly for
17 off-invoice customers and manual rebate customers. And right
18 now where we are is the third category that was used to
19 construct these Power Pivot tables, which is the OPIS data.
20 And we were just going to explain how the OPIS data works and
21 why it was pertinent to the creation of the Power Pivot tools
22 for the manual rebate and off-invoice tools. So we have
23 actually this category of data and one more category of data
24 before we get to the calculations for the customers in
25 question.

1 MR. VERNIA: Your Honor, he's testified regarding his
2 familiarity with it. Now he's proceeding -- as I understand
3 the question, he's going to proceed to describe the nature of
4 OPIS. And that seems to me to be the substance of the
5 testimony.

6 THE COURT: Does that mean, then, that you have no
7 objection -- assuming that he's qualified to offer an opinion,
8 that you have no objection to his testimony along the lines
9 that Mr. Hamilton is attempting to go into?

10 MR. VERNIA: Well, Your Honor, there is the other
11 issue of he's been offered as an expert on OPIS --

12 THE COURT: Not an expert. He's going to offer an
13 opinion. It's a lay opinion, though. And that's what he's --
14 that's what the foundation is attempting to relay. And that's
15 what you wanted to voir dire him on.

16 So my question was, assuming that he's accepted, not
17 as an expert but as a person who can offer this type of
18 opinion, will you waive an objection to his opinion along the
19 lines that Mr. Hamilton is trying to establish now? If --
20 obviously if you're going -- if you're not going to object to
21 it, then the Court should sustain the objection and just limit
22 the person's qualifications where we are. If, however, there
23 might be some objection raised to his testimony in this area,
24 then obviously the government should lay a foundation for it.

25 MR. VERNIA: Your Honor, as I understood the Court's

1 direction earlier, Mr. Hamilton was to address foundational
2 issues first and then go into substance. If the substance of
3 this testimony is going to be the nature of OPIS and I am still
4 allowed to voir dire him on other foundational issues, I don't
5 have an objection with proceeding. I just -- I thought it was
6 going to be foundation, substance, and it seemed to me that
7 Mr. Hamilton was crossing that line, sir.

8 THE COURT: Of course I'm not familiar with the
9 witness or the substance of his testimony. So you and
10 Mr. Hamilton have the benefit of me on that. So it's hard for
11 me to determine between what is foundation and what is
12 substance. Mr. Hamilton says this is still foundation. I
13 think you're of the opinion that this is substance.

14 MR. VERNIA: Yes, sir.

15 THE COURT: If you will concede that any testimony
16 he's going to give along these lines is just substance and does
17 not affect his qualifications, then the Court should sustain
18 your objection. There may be a difference with Mr. -- between
19 you and Mr. Hamilton as to what is foundation and what is
20 substance, I don't know, and I should not know. But if you are
21 conceding that assuming that the witness is qualified and
22 questions are going to be asked along these lines you will not
23 object on foundation, then the Court should sustain your
24 objection.

25 MR. VERNIA: Well, Your Honor, in the interest of

1 time, I don't object to proceeding as long as I can address
2 other foundational questions before the substance of those is
3 gone into. I'm -- I am satisfied with the witness's testimony
4 regarding his knowledge of OPIS to permit this to proceed. I
5 just wanted to make sure that I wasn't waiving my ability to
6 come back on other topics.

7 THE COURT: I think -- again, the only thing I know
8 is what you two have said and what this witness has said. But
9 I thought his testimony was that he had developed some type of
10 application or tool or software to incorporate OPIS—so he had
11 to have some knowledge of OPIS to do that—and he used this
12 tool that he created to generate some numbers or documents.
13 That may not have been what was intended. That may not have
14 been what he said. But it was not my understanding that he was
15 trying to demonstrate a knowledge of OPIS in the raw; it was
16 only using OPIS for some other purpose. But, again, I do not
17 know. You two know a lot more about this than I do.

18 Mr. Hamilton, are you willing to accept, then,
19 Mr. Vernia's representation as to this witness? Do you want
20 to proceed with trying to lay a foundation, or are you
21 satisfied?

22 MR. HAMILTON: No, we're not finished with our
23 foundation, as I said, but, as I was trying to explain to the
24 Court, Mr. Seay identified four categories of information that
25 went into the building of this tool, and the United States

1 maintains that for the Court -- if they are going to object to
2 his foundation to be a lay opinion witness about how these
3 tools operate so that the cost plus pump fee could be put into
4 it to generate a savings amount for a customer, then the United
5 States wants to lay a foundation to do that.

6 And the second reason that we want to lay a
7 foundation to do that is because ultimately where we're
8 heading is the submission to the Court and to the jury of 1006
9 summaries that calculate the loss to particular customers
10 based on pump fee, cost plus pump fees, and this is part of
11 the foundation, the voluminous business record data foundation
12 for the creation of those 1006 summaries. So -- so we would
13 like to continue with this whether they challenge his
14 foundation or not, because we're laying a separate foundation,
15 which is that there is a 1006 voluminous record basis for the
16 summaries that are at issue.

17 THE COURT: Very well. Objection's overruled.

18 BY MR. HAMILTON:

19 Q Mr. Seay, we were talking about, again, the second
20 category that you identified, but it's the third category that
21 we're talking about, OPIS information, right?

22 A Yes.

23 Q All right. So did you need to have OPIS information
24 to be able to build the Power Pivot tables for the manual
25 rebate and off-invoice calculations?

1 A Yes.

2 Q Specifically looking at what's on the screen, which
3 is a page from the Pilot direct sales manual, do you see a
4 definition of cost plus?

5 A Yes.

6 Q And what does it say there?

7 A "Cost plus is a pricing format where the trucking
8 company pays an industry-determined wholesale index price plus
9 a pumping fee."

10 Q And do you see the term "OPIS contract average"?

11 A Yes.

12 Q And what is the OPIS contract average?

13 A "Truck stop industry standard for 'cost' in cost
14 plus programs."

15 Q So if you are auditing a customer that received a
16 cost-plus discount, what would you need to have to know
17 whether or not that customer received an accurate savings
18 during a period of time?

19 A Both the OPIS average in addition to the pump fee
20 being applied.

21 Q But without the OPIS contract average, you've got
22 nothing to start with, right?

23 A Correct.

24 Q Based on your experience at Pilot, did you -- before
25 you even began the audit, have you told us that you had

1 familiarity with how the OPIS contract average is determined?

2 A Yes.

3 Q And was that exclusively based on your experience at
4 Pilot?

5 A Yes.

6 Q Would you mind stepping down here, please, and
7 explaining to the jury the way in which the OPIS contract
8 average is calculated?

9 A Sure. (Witness complying.) Okay. I'm going to use
10 Chattanooga as an example, from a market perspective. This is
11 a scenario so there's -- definitely not as complex as the real
12 thing, but hopefully we'll get a good comparison for you guys
13 in the process.

14 So imagine Chattanooga as of course you have I-75
15 coming down and I-24 coming across. I'm going to define a few
16 things, and I'll pause, hopefully, as I work through this. In
17 the case of Chattanooga, there are two primary source points
18 for fuel from a terminal location. The first is in the
19 northeast portion. The second would be in the southwest or
20 Lookout Mountain area.

21 So, first, the definition of a terminal. A terminal
22 is a large tank that holds fuel. So if you see the semi
23 trucks on the interstate with the large tanks on the back,
24 commonly they would come pick up fuel at these terminal
25 locations and transport it to our retail locations. That's

1 how we get most of the fuel to our retail locations that we
2 then sell to our customers. First terminal, large tank of
3 fuel.

4 So within -- one thing OPIS does is, OPIS defines
5 terminal markets. So you'll hear me refer to them also as
6 terminal city. Basically it's a collection of terminals that
7 will serve a greater market. In this case, our example, we're
8 looking at Chattanooga. So the collective terminals located
9 in this area and also this area combined are referred to as
10 the Chattanooga terminal city.

11 Q Mr. Seay, may I interrupt you there for a moment?

12 A Yes.

13 Q And I want to point you up to the screen, which is
14 we're looking at Government's Exhibit 302. And do you see the
15 term "Rack" there?

16 A Yes.

17 Q And could you read that to the jury what "Rack"
18 says?

19 A It's the wholesale distribution point for petroleum
20 products.

21 Q So when you say "terminal city," does that have any
22 relationship to rack?

23 A Yes.

24 Q Would you explain that to the jury before you go on
25 any further?

1 A I'll calculate what OPIS average will be for this --
2 this example. In this case the terminal city that it
3 represents would be the basis for the rack assignment for a
4 customer receiving a cost-plus or cost-minus discount based on
5 the Chattanooga rack.

6 Q And is the Chattanooga rack -- does that represent
7 the two tanks that you have shown on here?

8 A Correct. There would be multiples in this location
9 and probably multiples in this location. But, for simplicity,
10 I've just drawn two terminals, but...

11 Q And because the record can't take a picture of what
12 you're drawing here, do you mind if -- I'm going to try to
13 describe it, and you tell me if I get it right.

14 A All right.

15 Q You've got a white board up here. Is that right?

16 A Yes.

17 Q And you're using a blue pen?

18 A Yes.

19 Q All right. And you have drawn lines down the white
20 board, one line on this edge --

21 A Uh-huh.

22 Q -- another one bisecting that line.

23 A Yes.

24 Q And what is that intending to represent?

25 A Interstate I-75 and Interstate I-24.

1 Q Where they intersect. And you have drawn something
2 that looks like, to me, a large can?

3 A Yes.

4 Q And what is that intending to represent along I-75?

5 A A terminal.

6 Q A terminal is a tank?

7 A Correct.

8 Q Large tank containing fuel. And then down towards
9 the bottom part, below I-24, what have you drawn there?

10 A A second tank of fuel or terminal.

11 Q And so -- and for your model -- for your example
12 here you have one tank. What is that intended to represent?

13 A A fuel terminal.

14 Q And down here below I-24?

15 A A separate fuel terminal.

16 Q And a fuel terminal would then be more than one of
17 these large tanks?

18 A Typically yes.

19 Q Go on, please.

20 A So, for our example, fuel suppliers are companies
21 that would own the fuel within these tanks. They would
22 publish wholesale fuel prices for their product that a truck
23 could then come pick up and then take to a location. So I'm
24 going to draw an example where we have some fuel suppliers
25 that own products in their terminals or tanks.

1 Q All right. What is product?

2 A Product in this case would be diesel fuel. Of
3 course it would be the same scenario for the various grades of
4 gasoline, so regular gasoline, super gasoline, mid grade.

5 Q In this example, though, we're just talking about
6 diesel fuel?

7 A Diesel, yes, for the example.

8 Q Go on.

9 A So for these terminals we'll suppose there are three
10 suppliers that own fuel product; we'll say they're BP, Exxon,
11 and Valero. For this terminal we'll assume there's two fuel
12 suppliers that own product. One we can -- would be, for this
13 example, Marathon, and the last one would be Shell.

14 Q Before you go on, may I ask you a question? Why
15 haven't you used Pilot as an example of one of the suppliers?

16 A Pilot does not sell wholesale fuel to the market.
17 Well, we do not publish wholesale fuel costs along with the
18 other suppliers. If Pilot-- Pilot does own product in some
19 of the terminals, but where we do and when we do it it's for
20 Pilot use only or an unrelated wholesale -- a wholesale
21 business where we're selling whole loads of fuel at a time,
22 not to a retail location, not --

23 Q So in this example, just to clarify, if you have
24 it -- if you've got a three-component distribution line, just
25 to make it simple, where does Pilot fit into that? You've

1 got --

2 A For our main business we would be the retail
3 location where we would sell the product to our end customer.

4 Q And so in this example are these wholesale sellers,
5 BP, Exxon, Valero, Marathon, and Shell?

6 A Yes.

7 Q And Pilot is buying -- would be buying from one of
8 those entities?

9 A Correct.

10 Q And selling it on somewhere?

11 A Yes.

12 Q Go ahead.

13 A So for this example let's assume BP posts a price of
14 \$2.02 per gallon. Exxon posts a price of \$2.04 per gallon.
15 Valero posts a price of \$2.06 per gallon. Marathon posts a
16 price of \$2.03 per gallon, and Shell posts a price of \$2.05
17 per gallon.

18 Q So when you say "post," what do you mean?

19 A This is the wholesale price that was made public.
20 If you were to purchase fuel from this supplier out of this
21 terminal, this is the price that they would offer the fuel
22 for.

23 Q All right. Basically market price for their fuel.
24 So please go on.

25 A So there -- so, again, terminal is a large tank that

1 contains fuel. Fuel suppliers are the ones that own the
2 product within the tank, that they will then post or publish
3 their daily fuel price for their product.

4 So OPIS is a data aggregation company as well.
5 That's one of their services. And they would then compile the
6 posted retail -- or, excuse me, the posted wholesale price of
7 fuel, in this case for the greater Chattanooga market. They
8 would then basically calculate the average price of fuel for
9 this day.

10 So for OPIS -- the OPIS average for this day would
11 be \$2.04 if you were to take the average of all posted prices.
12 We then subscribe to OPIS as a service, OPIS would then remit
13 a OPIS contract average price of \$2.04 for the Chattanooga
14 market for this day.

15 Q And in order to know whether or not the OPIS average
16 was accurate at Pilot, would it be required to know how to
17 deconstruct this?

18 A Correct. You would need to know which fuel
19 suppliers are included in the average and then of course have
20 those -- we receive most of those prices, so -- but, yes, you
21 would have them.

22 Q And based on your experience at Pilot, did you gain
23 particularized knowledge about how to do that so you can
24 explain it to us today?

25 A Yes.

1 Q One other thing, just to clarify, again to -- so I
2 can make a record of what you've drawn.

3 A Uh-huh.

4 Q With the cylinder at the top of your description,
5 you have drawn parallel lines from the bottom. Is that
6 correct?

7 A Yes.

8 Q And then you have a cross-section of lines in the
9 three sections. Is that true?

10 A Correct.

11 Q The thing I want to ask you is, the diesel fuel from
12 BP, Exxon, and Valero kept in separate sections?

13 A No. It's commingled. So there is no
14 differentiation. So...

15 Q So based on this OPIS average of \$2.04, that you
16 have in your example here, can you explain to the jury how
17 that relates to a term that they've seen in the direct sales
18 manual, "industry-determined wholesale index price"?

19 A Yes. So it's -- it would reference -- the OPIS
20 contract average in green would represent this OPIS average in
21 this scenario.

22 Q And is index another term for average in that
23 instance?

24 A Or benchmark. Index is another term for benchmark.

25 Q And would this be the wholesale index price?

1 A Yes.

2 Q This is synonymous with OPIS contract average?

3 A Correct, for the basis for our retail -- or, excuse
4 me, for our cost plus and cost minus customers?

5 Q So approximately across the country how many rack
6 cities like Chattanooga like you just used an example are
7 there, I mean, approximately?

8 A There's hundreds. I'd probably venture that there's
9 thousands. But, yes, many.

10 Q All right. Would you please return to the witness
11 stand.

12 A Yes. (Witness complying.)

13 Q So, Mr. Seay, in constructing a rather -- and,
14 again, did you supervise the creation of the manual rebate
15 Power Pivot tool and the off-invoice Power Pivot tool?

16 A Yes.

17 Q And in supervising the creation of those tools, did
18 you rely on particularized knowledge about how OPIS works as
19 part of the process of constructing that?

20 A Yes.

21 Q And was the OPIS data that was used to support those
22 Power Pivot tables, the manual rebate and the off-invoice
23 tools, data that was kept and maintained and integrated in the
24 regular course of business at Pilot?

25 A Yes.

1 Q That brings us to our fourth category, I believe,
2 and was this, the fourth category, was the one that was
3 limited to manual rebate?

4 A Correct.

5 Q All right. So, so far, based on the three
6 categories that we have identified, what three categories have
7 we talked about in your testimony today?

8 A So, so far we talked about the historical customer
9 purchases, retail purchases at our locations, our fuel
10 purchases; we talked about the OPIS price index, and then we
11 also talked about the retail price at our retail locations.

12 Q And was that the information that was needed to
13 support the off-invoice Power Pivot table?

14 A The retail price would also be unique to the manual
15 rebate tool, because the off-invoice data that we utilized had
16 the original retail amount on the customer transactions that
17 we had access to.

18 Q All right. Well, then just so we can make sure that
19 our categories of information are clear, of the three
20 categories that we talked about so far, what are the only two
21 that were needed for the creation of the off-invoice tool?

22 A Those would be the OPIS price index and the customer
23 fuel purchases.

24 Q And so what is the third category that we've talked
25 about that would be needed for the manual rebate tool?

1 A The retail price at our Travel Center locations.

2 Q And do we still have one more category that we need
3 to cover for the manual rebate tool?

4 A Correct.

5 Q What is that?

6 A The original rebate payments that were made to our
7 customers.

8 Q And where did that information come from?

9 A Our Lawson financial system.

10 Q And what is the Lawson financial system?

11 A That's the system we use for all of our general
12 ledger and accounting and accounting and reporting.

13 Q What is Lawson?

14 A Lawson is a third-party application or software.

15 Q And is that something that Pilot would purchase?

16 A Correct.

17 Q And what is supported through the Lawson software
18 program?

19 A In this case it would be the general ledger system
20 that we had used to facilitate our accounting process within
21 our organization.

22 Q And was that data pulled to support the calculations
23 for the manual rebate pivot table?

24 A Yes.

25 Q And was the data that was pulled to support the

1 manual rebate Power Pivot calculations data that was kept and
2 maintained in the regular course of business of Pilot?

3 A Yes.

4 Q So how did these -- how did the manual rebate and
5 off-invoice data processing tools perform their function of
6 determining diesel fuel discount savings that Pilot customers
7 were owed?

8 A First it would determine the original discount the
9 customer received. It would then calculate what the discount
10 would have been based on the deal terms that were identified
11 during the customer audit, to then arrive at an amount due to
12 the customer.

13 Q And were these tools complicated to use once
14 constructed?

15 A No. We --

16 Q How would -- how would the tools -- let's start with
17 the manual rebate tool.

18 A Uh-huh.

19 Q How would the manual rebate Power Pivot tool -- once
20 it was constructed, how would that be used?

21 A We would have the source information. You'd
22 basically input the customer and the time period required to
23 retrieve the fuel purchases. You would obviously, again, have
24 to input the original rebate payments that were made. And
25 then you -- of course they would just source the other data

1 sets. So it was very simple inputs for the user.

2 Q And so when you say "source the other data inputs,"
3 what does that mean?

4 A So the OPIS price index, for example, the OPIS
5 contract average, that would be required. The tool itself
6 would then go out, based on the date range and the customer
7 fuel purchases, it would go obtain the appropriate cost plus
8 index prices to use for the calculation.

9 Q So once the tool was constructed, again, for the
10 manual rebate -- for manual rebate recalculations --

11 A Uh-huh.

12 Q -- what additional information is necessary to be
13 able to make the comparison necessary?

14 A We'd have to enter the discount terms to apply.

15 Q And what would -- when you say "discount term," what
16 do you mean?

17 A That would be the discount that would be applicable
18 for that customer, so you have the retail minus discount or
19 the -- and/or the pump fee related to a cost plus or cost
20 minus customer.

21 Q So in a cost-plus discount, what is the pump fee?

22 A What is a pump fee?

23 Q Yes. In the cost-plus discount, what is the pump
24 fee part of that equation?

25 A Okay. So a customer would commonly receive

1 typically reflected as a cents-per-gallon or
2 fraction-of-a-cents-per-gallon pumping fee. This amount would
3 be added to the OPIS contract average to determine their final
4 price. So cost plus .02, for example, in our scenario, if the
5 OPIS contract average was \$2.04 for that day, a customer
6 receiving 2 cents pump fee would be invoiced, or in the case
7 of manual rebate, that -- their final fuel cost would be based
8 on \$2.06, thus adding 2 cents to the 2.04.

9 Q So if during the audit for a customer -- let's just
10 call it, you know, XYZ Trucking.

11 A Uh-huh.

12 Q XYZ Trucking was determined that it should have
13 during a period of time been receiving a cost plus .02
14 discount, it actually had been receiving a cost plus .04
15 discount. How would the manual rebate tool operate to be able
16 to calculate the difference? What would the operator of the
17 tool need to do?

18 A So they'd enter in the customer and the date range,
19 and of course supply the original rebate amounts that were
20 paid. They would then refresh the tool, which would produce a
21 summary report that would supply them with any amounts owed to
22 a customer.

23 Q And where does the -- would the pump fee, that 2 --
24 the cost plus .02 discount, need to be entered into the system
25 as well?

1 A We also -- yeah, we have to -- there's a place to
2 enter in all the customer discount terms, to apply the
3 discount.

4 Q How was the difference obtained between a cost plus
5 .04 discount savings amount and a cost plus .02 discount
6 savings amount?

7 A We reflect it as just a net dollars due. So, again,
8 it would take -- it would calculate the total amount of the
9 rebates that were originally paid to a customer, it would then
10 calculate what those rebates should have been based on the
11 entered discount terms, and then any difference between those
12 two amounts would then result in a dollar amount that was due
13 to the customer.

14 Q And what, if anything different, would be done to
15 calculate the difference for an off-invoice customer?

16 A It would be -- obviously there's less input, so in
17 this case the operator would simply specify the customer, the
18 date range in question, and then any discount terms to apply
19 and refresh the tool.

20 Q Are you familiar with a term a nontechnical user?

21 A Yes.

22 Q And so what does that mean to you?

23 A Technical user would be someone that has either been
24 educated or has worked with a computer science related
25 discipline, so someone that could develop software, someone

1 that could write queries to retrieve data and help, basically,
2 with the -- writing the language of the computer software that
3 they're operating in.

4 Q So how, if at all, were the manual rebate and the
5 off-invoice tools that you've described to us this afternoon
6 designed to be used by nontechnical users?

7 A So with the breadth of the audit, we were repricing
8 thousands of accounts, so we needed to leverage a greater team
9 to help us with the work. So as we constructed the tools, we
10 wanted to make sure that they could be easy -- you know,
11 simple to operate and produce the summaries that were
12 required.

13 Q And do you feel like you effectively did that?

14 A Yes.

15 Q Are these tools still used by Pilot today?

16 A Yes.

17 Q Were you asked by the United States Attorney's
18 Office to use the manual rebate tool and the off-invoice tool
19 to calculate some discount savings that should have been paid
20 to some customers based on an assumed cost-plus discount?

21 A Yes.

22 Q And I'm not going to ask you questions about these
23 exhibits, but just to -- I'm near the end of what we're
24 referring to as laying a foundation. I want to direct your
25 attention to some exhibits, just so I can ask you about them.

1 And before I ask you any questions, we're not going to display
2 them to the jury yet. So would you take a look at what's been
3 marked and they're in your binder as Government's
4 Exhibit 810A, 1522A, 1613A, and 1712A, 1826A. And are those
5 calculations in the order in which I named the numbers related
6 to BP Express, JTL, Amerifreight, Halvor, and Ryder?

7 A Yes.

8 Q And were those manual rebate customers?

9 A Yes.

10 Q And did you use the manual rebate tool that you've
11 described to us to generate the cost savings amount that
12 should have been made to those customers based on the
13 cost-plus discount that was provided to you by the United
14 States Attorney's Office?

15 A Yes.

16 Q Turning to one other exhibit, which is identified as
17 727A. Do you see that document there?

18 A Yes.

19 Q And is that a -- is that a cost plus comparison for
20 another customer called Queen?

21 A Yes.

22 Q And what tool did you use to calculate the cost plus
23 savings for Queen?

24 A This was the off-invoice Power Pivot repricing tool.

25 Q So I have at this point named six numbered exhibits.

1 I'm not going to repeat them. They're the last six numbered
2 exhibits that I referenced. I'm going to ask you some
3 questions about those, again, from a foundation standpoint.
4 Is the data that was used to generate those cost plus
5 comparison summaries voluminous in nature?

6 A Yes.

7 Q Is it -- is the data that's being used coming from
8 the data sets that you've described to us that support the two
9 tools that you've described for us today?

10 A Yes.

11 Q Was all that data kept and maintained and integrated
12 in the ordinary course of business at Pilot?

13 A Yes.

14 Q Is the data on those -- on the numbered exhibits
15 that I just named accurately summarized in those documents?

16 A Yes.

17 Q Did you supervise the creation of those documents,
18 the numbered exhibits that I listed?

19 A Yes.

20 Q And is all of the work that you have done in
21 creating the cost comparison summaries for the customers that
22 I've named based exclusively upon your particularized
23 knowledge that you have gained during your employment at
24 Pilot, in all of the roles that you have described to us this
25 afternoon?

1 A Yes.

2 MR. HAMILTON: Your Honor, at this time not only does
3 the United States submit that an accurate foundation has been
4 laid for this witness to testify as a Rule 701 witness on lay
5 opinion based on his use of the tools but the United States
6 also submits that it has laid a proper foundation for the
7 admission of the numbered exhibits that I just listed as
8 admissible Rule 1006 summaries.

9 THE COURT: Mr. Vernia?

10 MR. VERNIA: Thank you, Your Honor.

11 (Brief pause.)

12 VOIR DIRE EXAMINATION

13 BY MR. VERNIA:

14 Q Good afternoon, Mr. Seay.

15 A Good afternoon.

16 Q My name is Ben Vernia. Sorry for that sound. I'll
17 try to do this more quietly. I'm not sure that I'm going to
18 need this, but I want to set it up just in case.

19 Ms. Lewis, if you could switch to --

20 THE COURTROOM DEPUTY: Yeah, you can do that up
21 there. When you hit "VGA," that would be you.

22 MR. VERNIA: Thank you.

23 THE COURTROOM DEPUTY: You're welcome. I did it.
24 It's there already. I switched it for you.

25 MR. VERNIA: Thank you very much.

1 THE COURTROOM DEPUTY: You're welcome.

2 BY MR. VERNIA:

3 Q Mr. Seay, when Mr. Hamilton was speaking with you,
4 you described your job in fuel accounting.

5 A Correct.

6 Q And as I understand it that took from 2002, in
7 various positions, to -- through December of 2011. Is that
8 right?

9 A That's correct.

10 Q And yesterday Mr. Parent was here. You know
11 Mr. Parent?

12 A I do.

13 Q And Mr. Parent was describing one of the goals on --
14 I don't want to summarize his testimony too much, but --

15 MR. HAMILTON: I'm going to object to referencing --
16 objection to referencing a witness. It's a violation of the
17 rule of sequestration, Number 1.

18 THE COURT: Well, let's get the question out. We
19 don't know what the question is yet, do we?

20 MR. VERNIA: Your Honor, I can skip -- I can skip
21 over Mr. Parent's testimony.

22 THE COURT: Very well.

23 BY MR. VERNIA:

24 Q Have you ever heard the phrase "Buy low, sell high"?

25 A Yes.

1 Q Is that -- is that a reasonable business strategy in
2 the fuel industry?

3 A Yes.

4 Q And when you were involved in fuel accounting, is it
5 fair to say that you were on the buying side?

6 A The purchase side, yes. Yeah.

7 Q So in that dichotomy, buy low, sell high, you were
8 really talking about the buying?

9 A Correct. I had some experience with the accounting
10 regarding the -- well, no, we actually produced -- so let me
11 clarify. We produced common or daily reports and then monthly
12 reports as well on the fuel margin. So in regards to what we
13 sold the product for and what we paid for the product, our
14 team was the primary respons- -- or the primary team
15 responsible for reporting the actual what we call gross fuel
16 margin of the product in our company. That's pre- -- gross
17 fuel margin is pre-customer discounts. But, yes, so in this
18 case we would report on both. We account -- we were
19 responsible for the accounting for the buy, but we would do
20 daily and monthly reporting on both, the -- the sell.

21 Q But you were saying that was exclusive of customer
22 discounts?

23 A For the daily reporting, yes. Our analysis we did
24 at a monthly level once the store profit and loss statements
25 went out involved us having to research customer discounts

1 commonly. So we had to have a fundamental understanding of
2 the customer discount process to do so.

3 Q But did you work with individual customer accounts?

4 A No, not that granularity, prior to April 2013.

5 Q Did you try to resolve disputes between Pilot and
6 customer? This is all -- I'm all speaking right now that
7 period from 2002 to two thousand -- the end of 2011.

8 A Uh-huh.

9 Q Did you have any role in resolving disputes with
10 customers over their rebates or discount terms?

11 A Not in that period.

12 Q What about in the period from January 2012 until the
13 day of the search?

14 A Not customer disputes. I got -- I started becoming
15 more involved in the customer-level data in regards to my
16 term, my team, but mostly on the point of sale sides as it
17 applies to our loyalty program, which is tied to customer
18 accounts.

19 Q You said "loyalty program"?

20 A Uh-huh.

21 Q So that's, like, points for buying fuel?

22 A Correct. Similar, yes.

23 Q Okay. Did you have any role in assessing rebates or
24 off-invoice discounts during that period?

25 A Not during that period, no.

1 Q Okay. So really from the -- from the beginning of
2 your employment at Pilot until the day of the search, you
3 really had no role in customer -- in manual rebates and
4 customer rebates and off-invoice discounts and that whole
5 world?

6 A I had to have a fundamental understanding of the
7 accounting and the dollars associated with those rebates and
8 discounts, yes. I worked with that data in my fuel accounting
9 role. As for the customer level side, no. But, yes, I was
10 very familiar with our discounting process.

11 Q And after that, you got involved?

12 A Heavily, yes.

13 Q Okay. So the days before April 15th were kind of
14 the good old days in some respects, right?

15 A (Witness shrugs shoulders and nods head.)

16 Q You nodded. Just for the record, I'll say you
17 nodded. When you became manager of business intelligence in
18 January 2012, was that a newly created position?

19 A No. I replaced someone who left the role.

20 Q All right. How was it that you got involved in
21 Pilot's audit of manual rebates? Who asked you to do that?

22 A My boss at the time was the one who first approached
23 me, David Clothier.

24 Q Okay. And from the beginning did you have those two
25 roles that you described earlier?

1 A Yes.

2 Q And I think you were senior manager and technical
3 lead?

4 A That was for the audit. That was the role in the
5 audit team, yes. It wasn't an official, you know, HR title,
6 but that was my role for the work of the audit.

7 Q I understand. How many people were involved in the
8 audit?

9 A A lot. So, internally, our internal audit team, we
10 had typically, probably, I'm guessing, 10 to 15 individuals on
11 that team working on the audit at any one time. There were
12 three of us that served in more of those senior manager lead
13 roles. We also commissioned with accounting firms as well to
14 help us with head count, to get through all the customer
15 account audits. So there was -- from a head count, there was
16 anywhere upwards of probably an average of 35 to 50 people
17 working on the project during the peak periods.

18 Q And at that point you personally and Pilot
19 management knew that there was a criminal investigation?

20 A Correct.

21 Q Because of the search?

22 A Yes, after the affidavit was published.

23 Q And did you also know—I'm talking about you
24 personally—whether Pilot had been sued?

25 A Sued when? Like, prior, or --

1 Q When did you learn --

2 MR. HAMILTON: Objection, Your Honor. This is
3 irrelevant to his foundation and whether or not he has
4 sufficient information to make the calculations.

5 MR. VERNIA: Your Honor, this goes directly to
6 whether these tools were created for a specialized purpose,
7 including in anticipation of litigation.

8 THE COURT: Overruled.

9 BY MR. VERNIA:

10 Q So let me just rephrase the question a little bit.
11 You eventually learned that Pilot had been sued in civil
12 court, correct?

13 A Yes.

14 Q When did you learn that?

15 A Are you referring to the class action lawsuit?

16 Q I'm referring to any lawsuit relating to the
17 disputes involving manual rebates and discounts.

18 A My initial familiarity were involving the class
19 action lawsuit that was resulting from the activities after
20 the raid.

21 Q And how soon after the raid was that?

22 A I can't recall.

23 Q Do you know whether the audit process-- Well, let
24 me go back for a second. Was it within days? Within months?
25 Within weeks?

1 A I -- from when we found out about the lawsuit?

2 Q The class action.

3 A I can't remember. More than weeks, but -- my
4 familiarity, but...

5 Q Was there discussion amongst Pilot management of the
6 need to perform the audit in anticipation of potential
7 litigation?

8 MR. HAMILTON: Objection. Hearsay.

9 A No.

10 THE COURT: He's answered the question. He says no.
11 BY MR. VERNIA:

12 Q Pilot was getting a lot of bad press at this time,
13 wasn't it?

14 A Yes.

15 MR. HAMILTON: Objection.

16 THE COURT: What's the relevance of the bad press?

17 MR. VERNIA: Your Honor, it relates to the likelihood
18 of litigation.

19 MR. HAMILTON: May I respond to that, Your Honor?

20 THE COURT: No, I think that is too far afield.
21 Sustained.

22 BY MR. VERNIA:

23 Q During the audit process, Pilot put a lot of effort
24 into making affected customers happy and willing to do
25 business again with Pilot, right?

1 A We treated no customer any different on the audit.

2 Q I'm saying that Pilot put a lot of effort into
3 making all of its customers happy during the audit.

4 MR. HAMILTON: Objection to the relevance of this
5 process.

6 MR. VERNIA: Your Honor, Mr. Hamilton-- I'm sorry.
7 Go ahead.

8 THE COURT: I take it that except in most unusual
9 businesses one of the goals is to make all the customers happy
10 all the time. I don't think people stay in business long if
11 their goal is to make customers unhappy.

12 MR. VERNIA: Your Honor, the point of this line of
13 questioning is, Pilot was facing enormous outside pressure to
14 make these --

15 THE COURT: But your question was, "You were spending
16 effort to make the customers happy." I'm assuming if you ask
17 anybody at Pilot at any time, "Are you spending a lot of effort
18 to make the customers happy?" the answer would be what?

19 MR. VERNIA: It would be, "Certainly so." But that
20 was the point --

21 THE COURT: And wasn't there a fairly lengthy video
22 shown earlier in this case where someone was pretending to be a
23 truck driver? And the whole point of that was what? "How hard
24 we have to work to make the customers happy," right?

25 MR. VERNIA: How the customers needed to be made

1 happy, yes, sir. Your Honor, my --

2 THE COURT: So I think at any time if you ask anybody
3 in business, "Were you making efforts to make the customer
4 happy?" the answer has to be yes.

5 MR. VERNIA: Your Honor --

6 THE COURT: And I'm assuming if he said no, his
7 bosses would not have him employed any longer.

8 MR. VERNIA: Your Honor, the company had just
9 undergone a search of its entire headquarters. And
10 Mr. Hamilton's --

11 THE COURT: So the answer would be, what, "Yes, yes"?

12 MR. VERNIA: I think it goes directly, Your Honor, to
13 the reason the tool was created versus what the United States
14 wants to present, which is that the tool was created to reach
15 some sort of objective fact as to what the deals were and what
16 specifically was owed to each customer. And my line of
17 questioning is really --

18 THE COURT: Well, let's assume you're correct that
19 this whole thing was created to make customers happy.

20 MR. VERNIA: Yes, sir.

21 THE COURT: Isn't that a fundamental purpose of
22 business always?

23 MR. VERNIA: Absolutely, Your Honor. Absolutely.

24 THE COURT: Objection sustained.

25 BY MR. VERNIA:

1 Q The tool was not created for the purpose of this
2 litigation, was it?

3 A No.

4 Q Why was it created?

5 A I'm sorry?

6 Q Why was it created?

7 A The tool?

8 Q Yes.

9 A To help us determine, based on the results of the
10 audit, what amounts were due to any of our customers.

11 Q During the process of the audit, isn't it true that
12 Pilot gave the benefit of the doubt to trucking companies?

13 A That was common, but that was not always the case,
14 but when in doubt, if we had -- yes, I mean, that was common.

15 Q So Pilot sometimes took trucking companies' word
16 when they claimed to have a certain deal in place, even if
17 there was no --

18 MR. HAMILTON: Objection, Your Honor. The United
19 States objects to relevance. This is really just
20 cross-examination cloaked as something labeled as a voir dire.
21 And what I thought we were testing was whether or not he had
22 sufficient knowledge to use the tool to calculate the cost
23 savings that are at issue, not what was going on at Pilot
24 during the audit.

25 MR. VERNIA: Your Honor, it goes directly to the

1 admissibility of this under 701. This was not prepared for the
2 purposes that the government described.

3 THE COURT: I'm not sure that I follow the logic
4 there. We just talked about how people in business try to make
5 their customers happy. And one of the ways that you make your
6 customers happy, is not getting into disputes with them. For
7 example, a lot of businesses will allow you to bring things
8 back, they make a big show about that that they have a very
9 liberal return policy because customers like that. And
10 sometimes people bring things back when they've worn them,
11 they've used them, and they have done other things, but the
12 business thinks it's better for the business as a whole to
13 generate that good public relations instead of getting involved
14 with disputes over minor things.

15 And this seems to be the same type of thing. Yeah,
16 maybe somebody didn't lose as much as they say, or maybe the
17 garment actually fit, "but it's better for our business to
18 make the customer happy." So isn't this the same thing?
19 They're trying to make the customer happy?

20 MR. VERNIA: Well, Your Honor, I think that -- I
21 think you're right in terms of businesses often prioritizing
22 customer happiness even over the objective truth --

23 THE COURT: And isn't this an example -- assuming
24 that what you're saying is correct and what the witness is
25 saying is correct, isn't this an example of that, then?

1 MR. VERNIA: Yes, I think it's relevant, Your Honor,
2 and I take Mr. Hamilton's point that it may be going into
3 cross-examination, and I'm happy to move on. I also notice
4 it's shortly after 5:00, Your Honor. I'm happy to continue or,
5 or not.

6 THE COURT: Well, this might be a good time to leave.

7 Ladies and gentlemen, while you're here, let me
8 bring up a point with you. I inquired of the attorneys this
9 morning how long they thought that they were going to go, and
10 they're thinking right now it's going to go into February.
11 One of the jurors has accepted a new job, and will be leaving
12 Chattanooga. And we're going to be losing that person on the
13 jury. I would like, to the extent that we can, to push
14 forward as much as we can. That's one of the reasons we're
15 having court tomorrow. I told you at the outset we were going
16 to try to not have court on Fridays, but we are going to try
17 to set some -- not every week but some Fridays, because I
18 would like to get as much accomplished as we can.

19 One of the jurors has indicated that they have a
20 conflict for January 20 through the 27th. And when I talked
21 to counsel this morning, they asked me about that date because
22 they're -- for the most part they're from out of town, and
23 they have to fly in and they get hotel rooms and they have
24 witnesses and things. So they'd like to get as much notice of
25 that as possible. And we want to be flexible with you, and we

1 don't want to lose anyone else from the jury. So I would like
2 that particular juror to talk to our courtroom deputy or our
3 deputy clerk about that conflict, to see if there might be
4 some way that we could keep that juror on the jury and then
5 still proceed that -- that week.

6 So we're going to have court tomorrow. We'll start
7 at 9:00. You've heard one of the press reporters asking for a
8 hearing. And we've set aside some time for that tomorrow. So
9 I don't anticipate that's going to be all that long. That
10 will take up some time tomorrow afternoon to do that. Okay?
11 And we will be taking lunch tomorrow right at noontime because
12 I'll be performing a marriage ceremony in this courtroom while
13 you're at lunch tomorrow. So if you'd like to stay and
14 witness it, feel free to do so.

15 Okay. The jury is excused.

16 (The jury exited the courtroom, and the proceedings
17 continued as follows:)

18 THE COURT: Be seated.

19 You can step down if you'd like.

20 THE WITNESS: Okay.

21 THE COURT: And, Ms. Lewis, would you and/or Allison
22 talk with -- I think it's Ms. McDaniel who has a conflict, to
23 see where we stand there. And I would like to encourage her,
24 if she can, to resolve that conflict, so she can stay on the
25 jury. We're getting pretty close to just having 12 people, and

1 we still have a long time to go.

2 THE COURTROOM DEPUTY: I talked to her, Judge. I've
3 talked-- I'll talk to her again.

4 THE COURT: And I think one of the defense attorneys
5 had actually suggested I make inquiry about that, about the
6 week of the -- she has the 20th -- I guess the 22nd, is that
7 Monday? Is what I did sufficient?

8 MR. HARDIN: Your Honor, I'm not sure whether it
9 applies to one of the others. May I address the Court?

10 THE COURT: You may.

11 MR. HARDIN: You may have noticed that this entire
12 week Mr. Drumheller has not been a part of our team. He has a
13 long time been, for the last three or four years, a member of
14 our team most actively day to day involved in the case. And
15 his absence this week—and we did not try to ask for any kind
16 of consideration—it has been due to the flu, which he's now a
17 third of our team that's got it. We're crossing our fingers
18 for the rest of us. But the reason that we would like to --
19 that week they're talking about, the 22nd, if at all possible,
20 for us to not be here so that he can continue to be part of the
21 trial team. His -- he was the only member of our firm,
22 fortunately, that was flooded out during the Harvey floods.
23 But he had to move out of his house. He and his family with
24 three children have been living in rented housing until they
25 can get the house done. The house is being completed, and

1 we're told that he's trying to schedule movers -- the movers.
2 They're scheduled to move back in on Monday.

3 THE COURT: Monday the 22nd?

4 MR. HARDIN: Which would be -- I think that's the
5 22nd. And so we were going to ask-- First of all, I think the
6 defense hopes the Court can make accommodations for this juror,
7 period, that week. I think I heard yesterday some reservations
8 with the Court, understandably, about scheduling. And so I
9 think we've agreed, first and foremost, we hope the Court will
10 be able to keep that juror on. But, secondly, whichever you
11 decided, we're asking on our behalf in order to have
12 Mr. Drumheller back, if we could perhaps, no matter what you
13 decide, at least have that Monday the 22nd off.

14 THE COURT: Now, will he be available the rest of the
15 week?

16 MR. HARDIN: Yes, sir.

17 THE COURT: Okay.

18 MR. HARDIN: But I think somebody else had the 29th,
19 though.

20 MR. VERNIA: Your Honor, I have a whistleblower
21 client who has been trying to schedule a meeting in Washington,
22 D.C., with the Department of Justice, and they've been hoping
23 that we can set that up for the 26th. I don't know whether
24 you're anticipating—that's a Friday—sitting on Friday or not.
25 If I can't work that out, I can possibly set up another date,

1 but it's been a little bit difficult --

2 THE COURT: And I guess you need to know that soon,
3 don't you?

4 MR. VERNIA: Yes, sir. Thank you.

5 THE COURT: Thank you.

6 Anyone else have issues with that week?

7 MR. HAMILTON: We would just like to have an
8 opportunity to speak on the trial schedule when that time
9 comes. We don't want to waive the government's right to
10 address the Court on this. I don't have an issue with that
11 week. We're ready to work and proceed with that week, but may
12 we speak when we're given an opportunity, please, Your Honor?

13 THE COURT: Well, the Court is hopeful that the
14 government will be done with its case by then, so we'd be
15 looking at the defendants' time. My first preference is to
16 have the trial that full week. If we cannot keep the juror, if
17 she is not able to resolve the conflict, we -- the decision
18 then is to go on and let the juror go, or keep the juror on and
19 not have trial that week. With Ms. Sellers leaving, we'll be
20 down to just two alternates. And if we let this juror go,
21 we'll just have one alternate left. And my expectation is
22 we're looking at, what, another four weeks, six weeks of trial?

23 MR. HARDIN: Yes, sir.

24 THE COURT: And just having one alternate is very,
25 very risky.

1 MR. HAMILTON: Your Honor, I don't know-- May I
2 speak, Your Honor? I don't -- I'm not following how we have
3 four to six more weeks of trial. If the United States can
4 finish its case in the next few trial days, I would -- I would
5 respectfully ask the Court to inquire of the defense how long
6 their -- how many trial days they're projecting. It's unclear
7 as to where the five- to six-week calculation is coming from.

8 THE COURT: Out of my --

9 MR. HAMILTON: It's not from us.

10 THE COURT: It's my assumption the government would
11 take five to ten of those days.

12 MR. HAMILTON: We-- Well, what has been difficult
13 for us, of course the Court has observed, I believe, is for us
14 to project the cross-examination length. That's what makes it
15 very difficult for us. We could put our proof on probably in
16 two days if we -- without four lawyers cross-examining for two
17 hours.

18 THE COURT: Well, we have four defendants. And
19 somebody decided to charge four defendants.

20 (Laughter.)

21 MR. HAMILTON: That's fair. And others. But-- And
22 that's fair. But to create a crisis over the -- over the
23 presence of jurors over something that the United States just
24 doesn't see, that's all I'm pointing out to the Court. We
25 believe that the United States is going to finish its case

1 sooner than the defense counsel is anticipating, and that this
2 case is going to be wrapped up. And we want to proceed.

3 We think the United States has an interest in the
4 continuity of the proof. We had a lengthy interruption that
5 we're already having to overcome with the holiday break for
6 four or five weeks. And we would prefer not to have any
7 more -- any more delay such as a week delay because of a juror
8 issue.

9 THE COURT: You understand that if we let that juror
10 go, we'll just have one alternate; and if something happens
11 with two more jurors, we would not have 12 people, so we'd have
12 to try the case again.

13 MR. HAMILTON: Well, we certainly don't want that,
14 Your Honor, and we certainly don't want to be responsible for
15 that. However, when is the -- will the Court please remind the
16 government when our juror is leaving for Knoxville and how much
17 time we have there?

18 THE COURT: Her job starts February -- February 8th,
19 and she'll be driving their moving truck to Knoxville on the
20 5th. Her last day of work here is February 2.

21 MR. HAMILTON: And I --

22 THE COURT: So today's the 11th. So we're looking at
23 about—what's that?—two weeks in January before we have to
24 lose her.

25 MR. HAMILTON: I see, Your Honor. And the other part

1 of the analysis for the government is how many trial days we're
2 going to -- the Court foresees giving us each week.

3 THE COURT: Well, as you heard me tell the jury,
4 we're adding some Fridays now. I had not planned to do that.
5 And my wife is very unhappy about it. But we've added that to
6 make up some for the days we've lost, and also because the
7 trial is, frankly, taking longer than I thought it was going to
8 take. So we have added some Fridays to the schedule.

9 MR. HAMILTON: Well, I hear the concern that the
10 Court has expressed. And the United States certainly doesn't
11 want to risk any problem with this trial because of not having
12 enough jurors. Could the United States just reserve its
13 position on what it wants to do about the week of January 22nd
14 until the Court has more information from that juror?

15 THE COURT: Okay. Ms. Lewis, just by facial
16 expression, did not look that optimistic. I think they've
17 talked to her before. I'm going to ask that they talk to her
18 again. I don't -- I do not know what the conflict is, but, you
19 know, we have human beings and they have things that go on in
20 their lives. It may be something that she cannot avoid.

21 MR. HARDIN: Your Honor, may I respond very briefly?

22 THE COURT: You may.

23 MR. HARDIN: I think each defendant, based on our
24 conversations, has got five to six witnesses. That was before,
25 in all due deference, the government decided to start objecting

1 on cross to outside the scope. That was not what was happening
2 early on. And what that preordains is that we're going to
3 probably have to call back some of the very witnesses that they
4 restricted. And the Court made very clear you understood that.
5 The government understood it, and they were doing it. So their
6 complaining now about how much longer it's going to take and
7 how long we're going to take is somewhat like a child
8 complaining, having killed his parents, that now he's an
9 orphan. They're creating part of this situation by the way
10 that they've determined to handle cross. They have the right
11 to do that. And of course the Court has the right to make
12 those discretionary rulings. But it does mean that it's going
13 to stretch out the trial.

14 And I would suggest that they might want to rethink
15 that if they really want to move this thing along. But,
16 regardless, we've got like -- if each side had five witnesses,
17 instead of all the others, you're talking about 20 witnesses
18 from the defense. So I don't want for a moment to think
19 that-- I understand they want it to move fast and they don't
20 want to unduly prolong this, but we do have clients that are
21 facing severe punishment.

22 THE COURT: Well, I think you heard that my
23 estimation was that we were going to go into March.

24 MR. HARDIN: And I think the Court's estimate and
25 what you were talking about while ago is pretty accurate as to

1 how this will go.

2 THE COURT: Okay. Is there anything further, then,
3 we need to do? If not, we'll resume at 9:00 in the morning.

4 CHORAL RESPONSE: Thank you, Judge.

5 (Evening recess.)

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